Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THE HIGHLAND IRRIGATION COMPANY, a mutual ditch company; and THE NINE MILE CANAL COMPANY, a mutual ditch company,

Petitioners,

v.

THE PEOPLE OF THE STATE OF COLORADO, ex rel. HAL D. SIMPSON, STATE ENGINEER; and STEVEN J. WITTE, DIVISION ENGINEER FOR WATER DIVISION 2,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Colorado

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Arkansas River Compact allows the Arkansas River Compact Administration to adopt an operating plan that substantially modifies the method of reservoir operation that Congress approved in the Compact.

2. Whether a water user must first prove his water rights are injured by a method of reservoir operation adopted by an interstate compact administration before he can claim the benefits of a different method of operation approved by Congress in the compact.

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below are named in the caption. There are no parent or subsidiary companies.

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OFFICIAL OPINIONS BELOW

The final opinion of the Colorado Supreme Court, as modified on denial of a petition for rehearing June 17, 1996, is reported. *People of State of Colorado ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242 (Colo. 1996) (hereinafter, "*Highland II*"). It is set forth at App. 1. The Petitioners seek review of this decision.

A previous opinion of the Colorado Supreme Court in this case, as modified on denial of a petition for rehearing April 24, 1995, is reported. *People of State of Colorado ex rel. Simpson v. Highland Irrigation Co.*, 893 P.2d 122 (Colo. 1995) (hereinafter, "*Highland I*"). It is set forth at App. 25.

The trial court's orders are not reported. Its orders dated March 8, 1994; July 3, 1995; and July 25, 1995, are set forth at App. 40, App. 47 and App. 50, respectively.

JURISDICTIONAL STATEMENT

The opinion of the Colorado Supreme Court was issued June 3, 1996. On June 17, 1996, the Colorado Supreme Court modified its opinion, and denied a petition for rehearing. This Court's jurisdiction rests on 28 U.S.C. § 1257(a)(1988).

STATUTE INVOLVED

The statute involved is the Arkansas River Compact, 63 Stat. 145 (1949). It appears at App. 51.

STATEMENT OF THE CASE

Overview

This case involves an operating plan (the "Operating Plan") adopted by the Arkansas River Compact Administration ("ARCA") for the operation of John Martin Reservoir (the "Reservoir"). The Respondents Hal D. Simpson, State Engineer, and Steven J. Witte, Division Engineer (collectively, the "State"), are state water rights administration officials who relied upon the Operating Plan to order the curtailment of diversions of irrigation water that would otherwise have been available to Petitioners' decreed water rights. The Petitioners are mutual irrigation companies. They contended in the courts below that the Operating Plan is invalid under the Arkansas River Compact (the "Compact"), and that the Chief Engineer of the Army Corps of Engineers has not approved the Operating Plan, as required by the Compact. The courts below rejected those arguments.

The Reservoir was authorized by Congress in 1936, 49 Stat. 1570, and is located in Colorado on the Arkansas River about 60 miles west of the Kansas border. A few miles upstream from the Reservoir, the Purgatoire River discharges into the Arkansas River near the Town of Las Animas. Colorado Water District 67 is located downstream from the Reservoir. Highland Irrigation Company ("Highland") and Nine Mile Canal Company ("Nine Mile") (collectively, the "Petitioners") divert irrigation water from the Purgatoire River upstream from its confluence with the Arkansas River. App. 26.

The allocation of the water within the Arkansas River drainage is controlled, in part, by the Arkansas River

Compact, a contract between Kansas and Colorado, approved by Congress on May 31, 1949, 63 Stat. 145 (1949), App. 26, and incorporated as part of Colorado's law. C.R.S. § 37-69-101 to 106 (1990 Repl. Vol. 15). Article V-F of the Compact states, in part:

> except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this compact, when there is water in the conservation pool the water users upstream from John Martin reservoir shall not be affected by the decrees to the ditches in Colorado water district 67.

App. 58.

The Colorado Supreme Court construed the quoted sentence literally in *Highland I*: ("[W]hen there is water in the conservation pool[,] the water users upstream from John Martin [R]eservoir shall not be affected by the decrees to the ditches in Colorado Water District 67.") App. 29. It had earlier construed the same sentence in *S.E. Colo. Water Cons. Dist. v. Fort Lyon Canal Co.*, 720 P.2d 133, 144 (Colo. 1986) ("While water remains in the conservation pool, downstream appropriators may not exercise their priorities against [upstream decrees]."). Hence, the storage of conservation water in the Reservoir suspends the operation of Colorado's prior appropriation doctrine, as between water rights above and below the Reservoir.

Congressional Proceedings

Congress approved the Compact after "Hearings Before a Subcommittee on Irrigation and Reclamation of

the Committee on Public Lands, House of Representatives, Eighty-First Congress (April 30, 1949)," the record of which was received in evidence. Portions of that record appear at App. 79. That subcommittee reviewed reports and heard the statements of Compact Commissioners that the Compact was intended to shift the burden of supplying the downstream senior District 67 ditches from the upstream junior ditches to the water in the conservation pool, until that supply is exhausted.

Gail L. Ireland, a former Colorado Attorney General and a Compact Commissioner, stated to the subcommittee that:

> It has been explained to you gentlemen that we had more or less of a compact within a compact because of the location of this reservoir.
>
> It more or less temporarily upset or changed the relative rights and positions of the water users above the reservoir in Colorado and the water users below the reservoir in Colorado. *But this compact also makes it possible now for water users above the reservoir who heretofore were restricted to the use of that water based on priority of right to ignore senior rights below which previously they could not do if they have a junior decree.*
>
> *Now, when there is water in that reservoir, the direct flow water above the water reservoir is open and free.* It has been a great benefit to the water users above the reservoir. By the same token, a controlled storage is a greater benefit to the water users below the reservoir.

Id. at App. 81 (emphasis supplied).

The Congressional proceedings also involved a "Hearing Before the Committee on Interior and Insular Affairs, United States Senate, Eighty-First Congress (April 29, 1949)," the record of which was received in evidence. Portions of that document appear at App. 83. A section is quoted below. Mr. Ireland testified:

> Mr. Vidal emphasized the fact that we had a great deal of difficulty in our own State because of the fact this reservoir was so located that it radically changed the position in many ways of users above the reservoir and below the reservoir. We feel that we have equitably ironed that out by providing that *when there is water in the reservoir the users above the reservoir, who up to this time have had to operate strictly according to decrees and according to priorities, may have the advantage of disregarding senior rights below,* because those users below, having the senior rights, now have the benefit of a controlled storage, which is much more efficient and valuable.
>
> *As has been mentioned, if at any time the reservoir becomes empty, the entire river in Colorado reverts back to the administrative decree system.* There is a provision in the compact which assists in the operation of making those changes back and forth when those conditions take place.
>
> * * *
>
> We feel we made the best compact that can be made, and that it will end up in a great improvement in the operation of this river in both States.
>
> The Chairman. This provision by which *you have suspended the operation of priorities so that the*

stored waters may be used to the maximum, as I get it, is a new principle, is it not?

Mr. Ireland. It is, and it is based upon contract among the water users, because it is not in conformity with our State law. *It has been for several years now operated under agreement between the water users and the compact specifically provides for continuation of such agreement.*

The Chairman. *So long as there is water in the reservoir that may be released, which protects the demand below the reservoir, nobody below the reservoir is injured?*

Mr. Ireland. *Correct.*

The Chairman. *But if the water supply in the reservoir should run low and these old priorities could not be served, then the other system is revived?*

Mr. Ireland. That is correct.

The Chairman. Is there any other provision in the compact which is different from the traditional method of handling water?

Mr. Ireland. I believe not, Mr. Chairman. I think that constitutes the only radical departure from what has generally been accepted in previous compacts and what is a part of the respective laws of the two States.

The Chairman. So that aside from that the compact is merely a division of the waters between the two States.

Mr. Ireland. That is right.

Id. at App. 85-87 (emphasis supplied).

The Colorado Water Conservation Board described the "upstream benefits" that the Compact was meant to

provide to upstream water users in a "Plan for Operation of Caddoa Project [former name of John Martin Reservoir] and Administration of Rights in Arkansas River (February 1944)," which was received in evidence. A portion of that Plan appears at App. 89. A section is quoted below:

> *By thus shifting the burden of supplying the rights and needs of ditches in Water District 67 from the junior priorities of upstream ditches to the irrigation pool,* the ditches upstream are enabled to make additional diversions, and in that way some of the conservation benefits of the Caddoa Project will be reflected into upstream areas, as intended, and be apportioned among upstream appropriators.

Id. at App. 89-90 (emphasis supplied).

Mr. Ireland briefed the effect of Article V-F in a "Statement Re: Interstate Relations under Plan of Operation of Caddoa Reservoir and Administration of Rights in Arkansas River (June 12, 1944)" to the Attorney General of Kansas, which was received in evidence. A portion of that Statement appears at App. 92. A section is quoted below:

> [Before the Compact,] the upstream ditches were authorized, in accordance with their respective unsatisfied priority rights, to divert all the streamflows available to them, allowing none to pass downstream to Water District 67. This long-established system of water-right administration, under the Constitution and laws of Colorado, has not been altered by the [reservoir]. *It will continue to prevail at all times when the priority rights of ditches in Water District 67 are*

> *similarly satisfied by supplies of water impounded in [the reservoir].*

Id. at App. 96 (emphasis supplied).

1980 Operating Plan

The Reservoir was operated pursuant to the Compact until 1980. In 1980, however, ARCA adopted a resolution approving an Operating Plan ("Operating Plan") that sets up individual storage accounts within the conservation pool for the benefit of District 67 users. App. 68. Under the Operating Plan, conservation water is "released" in an accounting process into District 67 storage accounts, for *"retention in the reservoir* and use on demand of the Colorado water users downstream of the reservoir in water district 67." *Highland II*, App. 4 (emphasis added). The Operating Plan allows District 67 users to "bank water in the reservoir for future use" even as they simultaneously demand or "call out [direct flow] water belonging to upstream users." Trial Court Order, App. 44.

> As revised in 1984, the Operating Plan replaces the common pool concept included in the Compact with a system of water accounts. Under the Operating Plan, Colorado water district 67 users, and Kansas are given the equivalent of savings accounts for water. Beginning the first of April, but no later than April 7 at 8:00 a.m., the stored water, or "conservation storage," is "released" into those accounts: forty percent for Kansas accounts, and sixty percent for Colorado water district 67 accounts. When water is "released" into the accounts pursuant to the Operating Plan, it is not physically released from the reservoir but is rather transferred on

> paper for accounting purposes. Once all of the conservation storage has been transferred to accounts, the Operating Plan provides that, for the purposes of the Compact, "the conservation pool shall be *deemed exhausted.*" (Emphasis added). [Italics in original]. *Since the conservation pool is deemed empty, Colorado water district 67 users, when they have a priority water right, can make a call against a water user upstream from the John Martin Reservoir under the Operating Plan, even though the reservoir might still physically contain storage water.*

Highland I, App. 29-30 (emphasis supplied).

Preliminary Proceedings in Trial Courts

On April 26, 1993, the reservoir was "deemed exhausted," and the Division Engineer ordered the Petitioners to curtail diversions for the benefit of downstream users. They refused and the State commenced separate actions against each Petitioner in a Colorado state court for preliminary and permanent injunctions. *Highland I*, App. 31. The Defendants removed those actions to the U.S. District Court. That court remanded the cases to the state court, *People ex rel. Simpson v. Nine Mile Canal Company*, 828 F. Supp. 823 (D. Colo. 1993), after finding that, although the Petitioners' defense was based on federal law, i.e., the Compact, it was not an essential element of the State's case. *Id.*

The U.S. District Court also noted that Petitioners had brought an action in 1992 in the U.S. District Court against the same state water officials. The Petitioners had sought a declaratory judgment that the Operating Plan

was invalid and unenforceable against the Petitioners' upstream rights when conservation water was in storage in the conservation pool. *Id.* That case was stayed pending resolution of *Kansas v. Colorado*, No. 105, Original. To date, that case remains administratively closed. *See Id.*

In pretrial proceedings in the state trial court in 1994, the parties stipulated, and the trial court entered as part of a pretrial order, that:

> Each of the senior water rights (Lamar Canal, Keesee, and Amity) had conservation water stored in its account on April 26 and April 27, 1993, and the water was stored in the physical storage space of the conservation pool of John Martin Reservoir, as defined by the Compact. In excess of 22,000 A.F. of winter conservation water was stored in Article II accounts when the State water officials issued their curtailment orders.

Pretrial Order, Record Vol. 5, p. 739, ¶ 12.

The state trial court refused to address the Petitioners' defenses, after concluding that the Petitioners lacked standing to challenge the curtailment orders. App. 45. In pertinent part, the state trial court found:

> pursuant to the 1980 Operating Plan conservation storage water is not actually released from the reservoir, but is reclassified into several different accounts, which are held by the users in Water District 67, which is located downstream. *The conservation pool is then deemed to be empty, and as a result the District 67 users may immediately call out water belonging to upstream users, while they bank water in the reservoir for future use.*

App. 44 (emphasis supplied). The state trial court went further to find:

> Although there was evidence that in the absence of the 1980 Operating Plan and Amendment "B" there might have been a one-time immediate benefit to defendants in April of 1993, that is not sufficient. The situation must be viewed over a longer term. *Defendants have not proved that throughout the irrigation season they are curtailed more frequently under the Operating Plan than they would be without it and that they are likely to be curtailed less frequently in the future if the Operating Plan is declared invalid.*

App. 45 (emphasis supplied).

Upon that finding of fact, the state trial court concluded as a matter of law that the Petitioners "do not have standing to raise the validity of the 1980 Operating Plan as a defense to this action." App. 45. The Petitioners were enjoined to comply with the State's curtailment orders, and costs and attorneys fees were awarded. App. 46.

The Colorado Supreme Court's First Opinion (Highland I)

The Petitioners appealed. Noting that the Petitioners were asserting their own interests in the administration of their water rights under the Compact, the Colorado Supreme Court reversed the trial court and held that Petitioners *did* have standing to assert their affirmative defense that the "Operating Plan was in direct violation of the Compact." *Highland I*, App. 39. The case was remanded for further proceedings.

Proceedings in the Trial Court on Remand

On remand the trial court held that the Operating Plan is "not contrary to the Compact," and that many years of conduct in conformity with the Operating Plan "established the approval of the Corps of Engineers." App. 48-49. The Petitioners appealed a second time to the Colorado Supreme Court.

The Colorado Supreme Court's Final Opinion (Highland II)

On the second appeal, the court below quoted the trial court's findings that:

> Highland and Nine Mile failed to prove that "throughout the irrigation season they are curtailed more frequently under the Operating Plan than they would be without it and that they are likely to be curtailed less frequently in the future if the Operating Plan is declared invalid."

Highland II, App. 5.

The court below stated that:

> In light of this authority [quoting certain sections of the Compact], the need to respect resolution of interstate differences, and recognizing that ARCA actions require the consent of both states, we are called upon to uphold those actions of ARCA which forward the purposes of the Compact, do not conflict with its material terms, and accord deference to management decisions that benefit both states and, through them, their water users.

Highland II, App. 15.

The Colorado Supreme Court recognized that the Compact affords a benefit to upstream junior priorities, but concluded that "ARCA's decision to transfer the water into the accounts in a manner which parallels releases from the reservoir under the Compact substantially affords the benefit contemplated by the Compact for upstream junior priorities." *Highland II*, App. 18.

The court concluded further "that the water court [trial court] was correct in ruling that Colorado *priority administration resumes when ARCA declares the conservation pool to be exhausted* by means of measured transfers into individual accounts for the benefit of Kansas and Colorado under the Operating Plan." *Highland II*, App. 21-22. (emphasis supplied).

The Special Master's Report in *Kansas v. Colorado*, No. 105, Original

The difference between operation of the reservoir under the Compact and operation under the Operating Plan is described in an "Order Granting Kansas' Motion to Dismiss Colorado's Well Counterclaim" [hereinafter, Order[1]], written by the Special Master in *Kansas v. Colorado*, and received in evidence, portions of which are quoted below:

> Under the 1949 Arkansas River Compact, a "conservation pool" is established in the reservoir, to be operated " . . . for the benefit of water users in Colorado and Kansas, *both upstream and downstream* from John Martin Dam. . . . " Article

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[1] The Order is not separately reproduced in the Appendix. Only the pertinent portions are quoted herein.

IV-C3. During the winter months, from November 1 through March 31, all water entering the reservoir is stored in the conservation pool, except that Colorado has the right to releases of 100 cfs. Article V-A.

During the summer, defined as April 1 to October 31, no flows may be stored in John Martin Reservoir when Colorado water users are operating under judicially decreed priorities. Article V-B. Under these conditions, Kansas is not entitled to any portion of the river flow entering John Martin Reservoir, but is apportioned the river flow that crosses the state line. Article V-G. Downstream from John Martin, the return flow from Colorado users in the area and occasional tributary inflow contribute to the flow of the river reaching the state line. When Colorado water users are not operating under decreed priorities, all summer flows entering the reservoir are stored, provided that Colorado may demand releases of water equivalent to the river flow up to 500 cfs, and Kansas may demand releases of water equivalent to that portion of the river flow between 500 cfs and 750 cfs. Article V-B.

Under the Compact, neither State is allocated a specific share of the water stored in the conservation pool. Rather, such stored water constitutes a common resource to be released " . . . upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period." Article V-C. Specific release rates are provided for each State, depending upon the amount of water in storage. *Id. The only limit, however, on the total amount of*

> *stored water that either State may take is the requirement that such water must be applied promptly to beneficial use, unless storage thereof downstream is authorized by the Administration. Article V-E(2).*

Order at 4-5 (emphasis supplied).

As the Special Master further found, the operation of the conservation pool under the Operating Plan is different:

> [The 1980 Operating Plan] *substantially modifies the method of operating John Martin Reservoir.* The common pool concept is abandoned in favor of allocating specific State shares in the stored water.
>
> * * *
>
> Under the 1980 Operating Plan, 40% of the stored water goes into a separate "Kansas account," *while 60% is divided in varying shares among the nine Colorado canal companies located within Colorado Water District 67.* Section II-D(2)(3). As to releases of water from these accounts, the Operating Plan provides:
>
> > "Kansas and the various Colorado ditches may demand the release of water contained in their respective accounts . . . at any time and at whatever rates they desire." Section II-E(1).
>
> The 1980 Operating Plan also allows three Colorado canal companies, namely, Amity Mutual Irrigation Company, Fort Lyon Canal, and Las Animas Consolidated Canal Company, to store certain "other water" in John Martin Reservoir. Section III-A, B, C. The permitted storage consists of water which Amity could otherwise divert from the Arkansas River and

> store in the Great Plains Reservoir system, and water which the other two canal companies could store under an approved Pueblo winter storage Plan. Section III-A, B, C.

Order at 6-7 (emphasis added).

Raising the Federal Questions

The federal questions involved in this case were raised in the following manner. When the State filed its complaints against the Petitioners in the trial court, it alleged that its curtailment orders "were issued pursuant to state law, the Arkansas River Compact, and the 1980 Operating Plan." Record, Vol. I, p. 20, ¶ 14; and p. 43, ¶ 13. When the Petitioners answered the complaints, they denied the foregoing allegation and set up affirmative defenses that the Operating Plan was "null, unlawful, void, unenforceable and ultra vires," Consolidated Answers at 4, ¶ 3; that the Respondents' curtailment orders were in "violation of the Arkansas River Compact," *id.* at 4, ¶ 8; that the "operation of the 1980 Operating Plan . . . deprives [Petitioners] of the benefits of the operation of the conservation pool, as provided by the Arkansas River Compact," *id.* at 4, ¶ 5; and that the Chief Engineer of the Army Corps of Engineers has never approved the Operating Plan, as required by the Compact. The court below summed up the defenses as follows: "In response [to the complaints], the defendants [Petitioners] asserted an affirmative defense, arguing that the Operating Plan was not a lawful basis for the State's curtailment orders because the Operating Plan was in direct violation of the terms of the Compact." *Highland I*, App. 31-32.

Before the trial, the Petitioners and the State filed cross-motions for summary judgment. The Petitioners argued that the Operating Plan violates the Compact, and that the Chief Engineer of the Army Corps of Engineers has never approved the Operating Plan, as required by the Compact. The State argued that the Operating Plan "was a valid exercise of the ARCA's authority under the Compact." *Id.*, App. 33. The cross-motions for summary judgment were denied. *Highland I* further describes the motions and their denials at App. 33-34.

After the trial, the trial court "found that the defendants [Petitioners] failed to prove that throughout the irrigation season they were curtailed more frequently than if the Operating Plan was not in place," *Highland I*, App. 35, and concluded that the Petitioners lacked standing to raise the validity of the 1980 Operating Plan. App. 34.

On the first appeal, the Colorado Supreme Court reversed, stating that *"the State's enforcement proceeding is entirely predicated on the assertion that the Compact gives the ARCA authority to enter into the Operating Plan,* which in turn purportedly gives the division engineer authority to curtail the defendants' [Petitioners'] diversions," *Highland I*, App. 39 (emphasis supplied), and that it was "not necessary for the trial court to get embroiled in the issue of whether the Operating Plan and Agreement B function to the ultimate benefit or detriment of the [Petitioners]." *Highland I*, App. 39. The case was remanded for consideration of the Petitioners' affirmative defenses. *Id.*

On remand, the trial court stated that findings of fact were previously made; that they "will not be repeated";

and that the issue is whether the Compact gives ARCA the authority to enter into the Operating Plan and whether the plan was approved by the Corps of Engineers. App. 47. It concluded that the Operating Plan is "not contrary to the Compact or in violation of the Compact." App. 48.

On the second appeal, the Colorado Supreme Court resolved the federal questions by ruling that the Compact allowed ARCA to adopt the Operating Plan, *Highland II*, App. 7, and that the Petitioners had failed to prove they would be curtailed more frequently under the Operating Plan than under the Compact. *Highland II*, App. 5.

REASONS FOR GRANTING THE WRIT

The Colorado Supreme Court's decision conflicts with this Court's decisions in *Nebraska v. Wyoming*, 507 U.S. 584, 113 S.Ct. 1689, 123 L.Ed.2d 317 (1993), and *Kansas v. Colorado*, 115 S.Ct. 1733, 131 L.Ed.2d 759 (1995). Its decision precludes a water user's reliance upon the express provisions of an interstate compact until the water user first proves to a trial court he is "worse off" under the compact administration's method of operation than the method of operation expressly approved by Congress in the compact. The lower court's decision vests in an interstate compact administration the power to modify substantially a method of operation mandated by Congress, and it simply ignores this Court's admonition in *Kansas v. Colorado* that "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms."

Congressional consent transforms a compact into federal law. Contract law applies. "[A] [c]ompact is, after all,

a contract." *Texas v. New Mexico*, 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987). In *Cuyler v. Adams*, 449 U.S. 433, 439, 101 S.Ct. 703, 707, 66 L.Ed.2d 641 (1981), this Court ruled that "construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question."

In this case, the Petitioners challenged the validity of the Operating Plan against the "no-call provision" of the Compact's Article V-F, which provides "when there is water in the conservation pool[,] the water users upstream from John Martin [R]eservoir shall not be affected by the decrees to the ditches in Colorado Water District 67." *Highland I*, App. 29 (construing Article V-F); *S.E. Colo. Water Cons. Dist. v. Fort Lyon Canal Co.*, 720 P.2d 133, 144 (Colo. 1986) ("While water remains in the conservation pool, downstream appropriators may not exercise their priorities against [upstream decrees].") (construing Article V-F).

Before trial, the parties stipulated, and the trial court entered as part of a pretrial order, that:

> Each of the senior water rights (Lamar Canal, Keesee, and Amity) had conservation water stored in its account on April 26 and April 27, 1993, and the water was stored in the physical storage space of the conservation pool of John Martin Reservoir, as defined by the Compact. In excess of 22,000 A.F. of winter conservation water was stored in Article II accounts when the State water officials issued their curtailment orders.

Pretrial Order, Record, Vol. 5, p. 739, ¶ 12.

On April 26, 1993, the State ordered the Petitioners to curtail all diversions under rights junior to downstream users. The quoted portion of the pretrial order establishes without question that there was conservation water in the reservoir, notwithstanding that ARCA had "deemed" it "exhausted." The U.S. District Court in *People ex rel. Simpson v. Nine Mile Canal Co.*, 828 F. Supp. 823, 825 (D. Colo. 1993), also determined that conservation water remained in the reservoir on April 26, 1993, before it remanded the cases to the state court. *Id.*

The Petitioners argued in the court below that ARCA could not give itself, by a resolution, the power to deem the reservoir exhausted. The court below concluded to the contrary, and held that ARCA has "Article VIII powers to adopt and implement the Operating Plan. . . . " *Highland II*, App. 20. It failed to mention any of the Special Master's orders or the legislative history of the Compact that the Petitioners called to its attention.

This Court's Special Master in *Kansas v. Colorado* concluded that ARCA has far narrower powers than did the Colorado Supreme Court. The Special Master thoroughly examined ARCA's powers in the "Report of Special Master Re Winter Storage Motions," which was received in evidence, and is set forth in part at App. 98. In pertinent part, the Special Master concluded that the "fundamental question here involves the powers" of ARCA. App. 102. He determined that ARCA's authority *"cannot come from [a] Resolution. Any such authority must derive from the Compact* or the authorizing legislation for [a separate project]." App. 104 (emphasis supplied). "The Compact Administration is a 'body outside the State' which has

been granted, by the Compact, a 'reasonable and carefully limited delegation of power,' " according to the Special Master. *Id.* "*[N]othing in the record supports a conclusion that the Compact Administration was intended to have greater authority than is evident from the Compact itself.* The powers of the Compact Administration were carefully circumscribed." *Id.* at App. 102 (emphasis supplied). "The history of the Compact negotiations shows a successive weakening of the powers originally proposed for the Compact Administration." *Id.* at App. 101 n.2. ARCA "cannot, by its own action, expand its powers; nor can a court order relief inconsistent with the express terms of the Compact." *Id.* at App. 101, *citing Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

This Court seemingly agreed with the Special Master's conclusions. *See Kansas v. Colorado*, 115 S.Ct. at 1736 ("We agree with the Special Master's disposition of the liability issues."). Although ARCA is empowered to prescribe procedures for the administration of the Compact, it must do so "*consistent with the provisions of th[e] Compact.*" *Id.* at 1740 (italics in original). ARCA "was not delegated power to change the Compact." *Id.*

To determine whether the Operating Plan is "consistent" with the Compact, it must be tested against the Compact and controlling judicial interpretations of the Compact. The Colorado Supreme Court has twice held that Article V-F precludes calls upstream while conservation water lies in storage. *See* pages 3 and 19 of this Petition. That precedent is controlling unless modified by this Court.

To the extent that a regulation is not in conformity with the statute and with controlling judicial interpretations of the statute, it conflicts with the meaning of such statute and is therefore unauthorized. *Bingham's Trust v. Internal Revenue*, 325 U.S. 365, 377, 65 S.Ct. 1232, 89 L.Ed.2d 1670 (1945). *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 104 S.Ct. 2778, 2781 n.9, 81 L.Ed.2d 694 (1984) (to give effect to Congressional intent, this Court stated it must reject administrative constructions that are contrary to clear legislative intent); *see also, Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 2863, 106 L.Ed.2d 134 (1989). ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

Ruling to the contrary, the court below concluded that the power to "administer the provisions of this compact"; the power to "[a]dopt, amend and revoke by-laws, rules and regulations consistent with the provisions of the compact"; the power to "[p]rescribe procedures for the administration of the compact"; the power to "[p]erform all functions required to implement this compact and to do all things necessary, proper or convenient in the performance of its duties"; and Article IV-D provisions for the "improved or prolonged functioning of existing works," gave ARCA the power to adopt an Operating Plan that "substantially modifies" (Special Master's finding, quoted at page 15, herein) the operating plan that Congress approved. *Highland II*, App. 14-16.

The Colorado Supreme Court announced a principle of law that it should uphold

> those actions of ARCA which forward the purposes of the Compact, do not conflict with its material terms, and accord deference to management decisions that benefit both states and, through them, their water users.

Highland II, App. 15. That principle differs substantially from this Court's statement in *Kansas v. Colorado* that, although ARCA is empowered to prescribe procedures for the administration of the Compact, it must do so "*consistent with the provisions of th[e] Compact.*" *Kansas v. Colorado*, 115 S.Ct. at 1740 (italics in original).

Excepting this Court's opinions, relatively little has been written on the authority of compact administrations, but Professor Robert E. Beck stated in 1991 that a 1971 study of water compacts reported that with few exceptions, "the authority granted to compact commissions has been exceedingly limited. . . . " 4 *Waters and Water Rights* § 46.01 at 553 (Robert E. Beck ed. 1991). "With few exceptions, the powers of the [interstate compact] commission[ers] are limited to making rules for implementing compact provisions and to gathering data about streamflow, water use, and other facts relevant to administration of the apportionment." *Id.* § 46.03 at 560.

Finally, the Colorado Supreme Court's apparent approval of the trial court's finding, *see* App. at 5, that Petitioners had failed to prove that "throughout the irrigation season they are curtailed more frequently under the Operating Plan than they would be without it and that they are likely to be curtailed less frequently in the

future if the Operating Plan is declared invalid," disregards *Nebraska v. Wyoming*, 113 S. Ct. 1689. In that case, this Court stated in an action to enforce an interstate apportionment decree, that,

> to the extent Nebraska seeks modification of the decree rather than enforcement, a higher standard of proof applies. The two types of proceedings are markedly different. *In an enforcement action, the plaintiff need not show injury. See, e.g., Wyoming*, 309 U.S. 572, 581 . . . (1940). *When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree.* To be sure, the right need not be stated explicitly in the decree.

Id. at 1695 (emphasis supplied). There is no precedent for the burden of proof imposed upon the Petitioners in this case.

Indeed, the Colorado Supreme Court's final opinion seemingly conflicts with its own opinion in *Highland I* that "[s]ince the defendants [Petitioners] asserted an appropriate basis for their affirmative defense, it was not necessary for the water court [trial court] to get embroiled in the issue of whether the Operating Plan and Agreement B[2] function to the ultimate benefit or detriment of the defendants. That issue need not even be decided on

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[2] Under a 1984 agreement titled "Agreement B" (referred to as "Amendment B" in the trial court's March 8, 1994 order), an entity having any summer stored water in its account cannot place a call above the Reservoir against the upstream ditches. *Highland II*, App. 16 at n.10. The Petitioners were not signatories to Agreement B. *Highland I*, App. 30 at n.6.

the merits of the defendants' affirmative defense." App. 39.

Congress consented to the Compact upon express assurances from Compact Commissioners that "when there is water in that reservoir, the direct flow water above the water reservoir is open and free," App. 81, and that "if the water supply in the reservoir should run low and these old priorities could not be served, then the other system is revived." App. 87. Hence, the stored water must be put to beneficial use before the downstream senior ditches can demand the direct flow water that is available to the upstream junior ditches. ARCA's Operating Plan reverses that sequence, and allows the downstream senior ditches to demand the upstream direct flow water for present use even as they simultaneously "bank water in the reservoir for future use." App. 44.

The lower court's opinion, if not reversed, validates ARCA's modification of the Compact, without Congressional consent. It conflicts with this Court's decisions in *Nebraska v. Wyoming, supra,* and *Kansas v. Colorado, supra;* and it conflicts with the Special Master's conclusions in *Kansas v. Colorado, supra,* which this Court seemingly approved. Nothing in the Compact allows ARCA to adopt an operating plan that allows the downstream senior users to store water in their "savings accounts" as they simultaneously demand that upstream junior users pass direct flow water to them. Save only the lower court's opinion, there is no authority for the proposition that water users must show injury from a compact administration's operating plan before they can demand

the enforcement of the Compact rights that Congress approved.

In essence, an administrative agency determined in 1980 that its Operating Plan worked better than the operating plan that two legislatures and Congress had approved in 1949. Water users complained immediately. As the Colorado Supreme Court stated in *Highland I*, "[a]fter the terms of the Operating Plan were initiated, some of the water users upstream from John Martin Reservoir apparently became concerned that they were subject to earlier calls under the Operating Plan than they had been before the Operating Plan." *Id.* at App. 30. The downstream ditch companies thereafter agreed with some of the upstream ditch companies that they would not call through the reservoir so long as they had summer stored water in their accounts. *Id.* That interditch agreement "affected the administration of water under the Operating Plan." *Id.* The Petitioners were not a party to that agreement. *Id.* at n.6.

In an effort to uphold the Operating Plan, the Colorado Supreme Court wrote that "ARCA's decision to transfer the water into the accounts in a manner which parallels releases from the reservoir under the Compact *substantially affords the benefit contemplated by the Compact* for upstream junior priorities." *Highland II*, App. 18 (emphasis supplied). The lower court's validation of the Operating Plan notwithstanding its tacit admission that the Operating Plan modifies the Petitioners' rights under the Compact, is nothing more than judicial acquiescence to the will of the majority ditch companies at the expense of the minority ditch companies. The Compact's operating plan was amended by an interstate agency that does

not even have rulemaking powers, much less legislative powers.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

The PEOPLE of the State of Colorado, ex rel. Hal D. SIMPSON, State Engineer; and Steven J. Witte, Division Engineer for Water Division 2, Plaintiffs-Appellees,

v.

The HIGHLAND IRRIGATION COMPANY, a mutual ditch company; and The Nine Mile Canal Company, a mutual ditch company, Defendants-Appellants.

No. 95SA245.

Supreme Court of Colorado,
En Banc.

June 3, 1996.

As Modified on Denial of Rehearing
June 17, 1996.

Justice HOBBS delivered the Opinion of the Court.

This appeal is from a judgment of the District Court for Water Division 2 enjoining appellants, two upstream mutual ditch companies holding junior priorities, The Highland Irrigation Company (Highland) and The Nine Mile Canal Company (Nine Mile), from any continued violation of diversion curtailment orders issued by the Division Engineer (Engineer). The curtailment orders were issued under section 37-92-502, 15 C.R.S. (1990), to enforce a call by owners of senior priorities downstream of John Martin Reservoir on the Arkansas River. In our previous decision, *Colorado ex rel. Simpson v. Highland Irrigation Co.*, 893 P.2d 122 (Colo.1995), we reversed the water court's determination that Highland and Nine Mile lacked standing to pursue an affirmative defense to the Engineer's enforcement orders posited on the Arkansas River Compact, chapter 155, 63 Stat. 145 (1949), section

37-69-101, 15 C.R.S. (1990), (the Compact). On remand, that defense was examined and rejected by the water court. The court ruled in favor of the state appellees, the Division and State Engineers. Pursuant to section 37-92-503, 15 C.R.S. (1990), the water court entered a judgment which included an injunction against further violation of the Engineer's orders and an award of costs and reasonable attorneys fees against Highland and Nine Mile. We affirm the judgment.

I.

Pertinent facts of this case are set forth in our prior opinion, *Colorado ex rel. Simpson v. Highland Irrigation Co.*, 893 P.2d 122 (Colo.1995), which we now summarize and supplement from the record before us. Under the Compact, John Martin Reservoir is operated by the Corps of Engineers, with the Arkansas River Compact Administration (ARCA) playing the key role in prescribing procedures for Compact administration and the management of John Martin Reservoir for the benefit of Colorado, Kansas and, through them, water users of both states. ARCA is composed of three members from each state. As to all decisions and matters of administration, each state has one vote and both states must agree. With regard to the Colorado ARCA members, Article VIII C provides that one member shall be a resident and water right owner in water districts 14 or 17 (upstream from the reservoir), one member shall be a resident and water right owner in water district 67 (downstream), and the third Colorado member shall be the director of the Colorado water conservation board.

Under Article VIII G(1) of the Compact, ARCA is directed to

> co-operate with the chief official of each state charged with the administration of water rights and with federal agencies in the systematic determination and correlation of the facts as to the flow and diversion of the waters of the Arkansas river and as to the operation and siltation of John Martin Reservoir and other related structures.

Article VIII H additionally provides that enforcement of the Compact will be accomplished primarily through the state agencies and officials charged with the administration of water rights within each state.

In 1980, ARCA adopted an Operating Plan, revised in 1984, designed to provide greater reliability in the use of John Martin Reservoir waters for the benefit of Colorado and Kansas water users. Under the Operating Plan, waters accruing to the reservoir's conservation pool during the "period of winter storage" between November 1 and March 31 of each year are re-allocated commencing the first week of April[1] to individual storage accounts in the reservoir, forty percent to Kansas, sixty percent to Colorado.

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[1] Under the Operating Plan, Section II.A., "[c]onservation storage shall be released into the accounts . . . beginning at the first request for release after March 31 of account water by a Colorado Water District 67 ditch or by Kansas or beginning at 8:00 a.m. on April 7, whichever occurs first." Section I.B provides that "summer storage season" shall commence "at the first exhaustion of conservation storage and continuing to and including the next succeeding October 31."

Colorado's sixty percent portion of the accrued conservation water is transferred into nine accounts, in percentages proportionately allotted to each of the nine downstream ditch companies, *Kansas v. Colorado*, ___ U.S. ___, ___, 115 S.Ct. 1733, 1744, 131 L.Ed.2d 759 (1995), for retention in the reservoir and use on demand of the Colorado water users downstream of the reservoir in water district 67. Under the Operating Plan, this transfer parallels in amount and duration those releases from the reservoir contemplated by the Compact. During the period of transfer into the accounts, the Colorado priority system is suspended in favor of water users upstream of the reservoir, with regard to water users below the reservoir. The Compact contains a no-call provision in favor of priorities upstream of John Martin Reservoir until ARCA determines that the conservation pool water will be exhausted within two weeks. Notice must be given within the two-week period of a day certain when priority administration of Colorado water rights will resume.

Prior to adoption of the Operating Plan, exhaustion of the conservation pool through physical releases from storage had occurred during April. Under the Operating Plan, when the water of the conservation pool is fully placed into the individual accounts at the beginning of the irrigation season, the conservation pool is deemed to have been exhausted, whether or not actual releases have been made from the reservoir, and the no-call provision abates in favor of priority administration within Colorado by the Engineer. The primary effects of the Operating Plan are to provide Colorado and Kansas each with a secure percentage of the conservation pool water and to alleviate pre-existing conditions which encouraged a race

to empty the conservation pool by the water users of both states. ARCA determined that John Martin Reservoir water is more efficiently managed for ultimate beneficial use through this procedure.

Under the circumstances of this case, transfer of conservation water into the accounts had begun on April 1 of 1993 and was completed on April 25. On April 26, 1993, three downstream ditch companies with senior rights were calling for irrigation water. In order to enforce the call, oral and written curtailment orders were issued to Highland and Nine Mile on April 26-27, 1993, but were ignored by Highland and, four days later, by Nine Mile. The Lamar, Keesee, and Amity companies properly placed the call under Colorado priority administration, since they held water rights senior to Highland's 1909 right and Nine Mile's 1887 and 1930 rights. Highland had two senior water rights totaling 24 cubic feet per second, as to which the curtailment orders were not applied.

Highland and Nine Mile continued thereafter during the 1993 irrigation season to divert from the Purgatoire River, tributary to the Arkansas River upstream of John Martin Reservoir, in violation of the Engineer's orders.

The Division and State Engineers brought an action under section 37-92-503, 15 C.R.S. (1990), in the water court to enforce the curtailment orders. The water court determined that Highland and Nine Mile failed to prove that "throughout the irrigation season they are curtailed more frequently under the Operating Plan than they would be without it and that they are likely to be curtailed less frequently in the future if the Operating Plan is declared invalid."

Implementation of the Operating Plan has not been to the detriment of Highland and Nine Mile. Duane Helton, expert for the state, testified that the diversions of Highland and Nine Mile had materially increased after implementation of the Operating Plan: during the pre-Operating Plan period, Highland's average yearly summer storage period diversions were 6,059 acre-feet; during the post-Operating Plan period, Highland's diversions averaged 8,944 acre-feet. Nine Mile's average yearly summer storage period diversions were 3,884 acre-feet during the pre-Operating Plan period, but during the post-Operating Plan period, Nine Mile averaged 5,533 acre-feet.[2]

Highland and Nine Mile request that we strike down the Operating Plan or, alternatively, effectuate a revision of its terms to incorporate their view of the Compact's no-call provision. They assert that the Compact supersedes the operation of Colorado's priority system as to the holders of priorities downstream of John Martin Reservoir while any unreleased transferred water remains in the individual accounts.

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[2] Helton additionally testified that: "If you compare the amount of water that was available at [Nine Mile] gaging station versus what was diverted during the 1950 through '78 period, the Highland and Nine Mile diverted 19.9 percent of the water at the Nine Mile gaging station. During the 1979 through '92 period, the Highland and Nine Mile diverted over 32 percent of the water available at the Nine Mile gaging station . . . [E]ven though there was a substantial reduction in flow . . . the diversions into the two ditches increased . . . over 12 percent on an average annual basis."

The State of Colorado and the amicus curiae Colorado Water Conservation Board and the mutual ditch companies downstream of John Martin Reservoir contend that the orders of the Engineer were lawful and must be enforced. They defend the Operating Plan as having been properly adopted by ARCA under its Compact powers, and they ask that the judgment of the water court be upheld. We agree.

II.

The states of Colorado and Kansas share a vital interest in the waters of the Arkansas River. As this river has nurtured the economy of both, *Kansas v. Colorado*, 206 U.S. 46, 108-13, 27 S.Ct. 655, 671-74, 51 L.Ed. 956 (1907), conflict over what share shall be enjoyed by the water users of each state has forged the federal law of equitable apportionment and of interstate water compact enforcement. The case before us again demonstrates that the river's reach continues to be matched by the vigilance of those who depend upon its strength.

A.

Early in the Twentieth Century, Kansas sought to establish that its territorial stretch to the heart of the Continental Divide dating from 1854, despite its later boundary attenuation by the establishment of the Colorado Territory and Kansas statehood in 1861,[3] had

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[3] Carl Ubbelohde et al., *A Colorado History* 100 (rev. centennial ed.1976).

resulted in Kansas citizens having the "right to the uninterrupted and unimpeded flow of all the waters of the river into and across the State of Kansas." *Kansas v. Colorado*, 185 U.S. 125, 135, 22 S.Ct. 552, 555, 46 L.Ed. 838 (1902). Seeking dismissal of this Kansas complaint sounding in common law riparianism, Colorado asserted "rights of sovereignty," *id.* at 143, 22 S.Ct. at 558, to consume all waters within its boundaries for beneficial purposes, arguing that its constitutional prior appropriation doctrine, upon statehood in 1876, had been "enacted pursuant to national authority, and ratified thereby at the time of admission of the State into the Union." *Id.* at 139, 22 S.Ct. at 557.

Following the 1902 decision refusing to dismiss the Kansas complaint, the Court in its 1907 equitable apportionment decision held that, by reason of statehood, each state has full jurisdiction over "the beds of streams and other waters" within its boundaries. *Kansas v. Colorado*, 206 U.S. 46, 93, 27 S.Ct. 655, 665, 51 L.Ed. 956 (1907). Each state can choose its own water law, whether riparian or prior appropriation, but neither state may impose its choice of law on the other. *Id.* at 94, 27 S.Ct. at 666. The national government's interest in reclamation of arid lands could not supplant the water law selection of either state. *Id.* at 92, 27 S.Ct. at 665. And an equitable apportionment of the interstate water body can be ordered by the Court, subject to revision from time to time, in the exercise of the Court's original jurisdiction. *Id.* at 117, 27 S.Ct. at 675.

The Court found that Colorado's development of Arkansas River waters had produced great benefit within Colorado with relatively lesser detriment to Kansas, *id.* at

113-14, 27 S.Ct. at 674, and therefore refused to prevent the "present withdrawal of water in Colorado for purposes of irrigation." *Id.* at 114, 27 S.Ct. at 674. The Supreme Court invited Kansas to return for relief, *id.* at 117, 27 S.Ct. at 675, if a material increase in depletion by Colorado resulted in "destroying the equitable apportionment of benefits between the two states resulting from the flow of the river." *Id.* at 118, 27 S.Ct. at 676.

B.

In the early 1940s, Colorado not Kansas commanded the return engagement. Colorado sought in the United States Supreme Court to enjoin Kansas water users from suing in state and lower federal courts to curtail Colorado diversions. In response, Kansas alleged that Colorado had materially increased its river withdrawals and asked that its rights be quieted. The Court's Master recommended a definitive solution in the form of a volumetric apportionment between the states. But each objected to the proposed decree. Citing the existence of "complicated and delicate questions" and the possibility of "change of conditions" in the future, the Court declined judicial "imposition of a hard and fast rule," stressing instead the necessity of "expert administration." *Colorado v. Kansas*, 320 U.S. 383, 392, 64 S.Ct. 176, 180, 88 L.Ed. 116 (1943).

Having placed the disputing neighbors squarely on notice of the transitory nature of case-by-case adjudication, the Supreme Court pointedly suggested that Colorado and Kansas invoke the compact clause, U.S. Const. art. I, § 10, cl. 2, "to achieve mutual accommodation and

agreement." *Colorado v. Kansas*, 320 U.S. at 392, 64 S.Ct. at 180.

C.

By this time, Colorado, mother of many rivers, had mined the compact wellspring, equitable apportionment having failed from its standpoint in *Wyoming v. Colorado*, 259 U.S. 419, 42 S.Ct. 552, 66 L.Ed. 999 (1922). In staggering succession, Colorado took the lead, largely through the prolonged and devoted work of Delph Carpenter,[4] but assisted by many others, in executing the Colorado River Compact, the La Plata River Compact, the South Platte River Compact, the Rio Grande River Compact, and the Republican River Compact.[5]

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[4] See Address of Honorable Ralph L. Carr, Former Governor of Colorado, to the Seventeen States of the National Reclamation Association (October 29, 1943), *in Delph Carpenter Father of Colorado River Treaties* 1-8 (Colorado Water Resources Research Institute, Colorado State University, 1991). *See also* Peter A. Fahmy, *Delphus A. Carpenter, in Six of the Greatest: A Tribute to Outstanding Lawyers in Colorado History*, 23 Colo. Law. 1479, 1479-82 (1994).

[5] Compacts are cited in order of their execution by the signatory states: Colorado River Compact, § 37-61-101, 15 C.R.S. (1990), ch. 72, 42 Stat. 171 (1921) (congressional consent to enter into the compact), 43 U.S.C. § 617*l* (1994) (the Boulder Canyon Project Act implemented and ratified the seven-state Colorado River Compact), La Plata River Compact, § 37-63-101, 15 C.R.S. (1990), ch. 110, 43 Stat. 796 (1925), South Platte River Compact, § 37-65-101, 15 C.R.S. (1990), ch. 46, 44 Stat. 195 (1926), Rio Grande River Compact, § 37-66-101, 15 C.R.S. (1990), ch. 155, 53 Stat. 785 (1939), Republican River Compact, § 37-67-101, 15 C.R.S. (1990), Pub.L. 60, 57 Stat. 86 (1943).

In pre-World War II litigation involving the La Plata River Compact, Colorado had discovered that compacts have teeth. Overruling an opinion of this court, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73, 70 P.2d 849 (1937), the United States Supreme Court held that a state may create and protect vested water rights to water use only as to the state's apportioned share of the interstate stream. Individual water users of the signatory states were bound by the compact even where their state had recognized their water rights prior to execution of the compact. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106, 58 S.Ct. 803, 809, 82 L.Ed. 1202 (1938).

Thereby, was it manifested that the Engineer can and should enforce compact delivery requirements with regard to Colorado water rights, adhering to the terms of the Compact and consistent, insofar as possible, with Colorado constitutional and statutory provisions for priority administration. *See Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 923 (Colo.1983). In this manner, citizens of Colorado can partake reliably of the state's compact apportionment through property rights perfected for beneficial use within the state. *See Weibert v. Rothe Bros.*, 200 Colo. 310, 317, 618 P.2d 1367, 1371-72 (1980).

III.

Colorado, by negotiation and settlement with Kansas, and with the ultimate approval of Congress, produced the Arkansas River Compact, section 37-69-101, 15 C.R.S. (1990), chapter 155, 63 Stat. 145 (1949) having achieved

execution and ratification, in the same time period, of the Upper Colorado River Compact, section 37-62-101, 15 C.R.S. (1990), chapter 48, 63 Stat. 31 (1949).[6] Kansas has required effective enforcement of the Compact. The United States Supreme Court has ruled that post-compact well pumping by Coloradans did cause material depletion of usable stateline flows in violation of Kansas rights under the Compact. *Kansas v. Colorado*, ___ U.S. ___, ___, 115 S.Ct. 1733, 1745, 131 L.Ed.2d 759 (1995).

John Martin Reservoir is a key feature to interstate cooperation between Colorado and Kansas. In matters of Compact administration, we understand the high importance which both states and all the litigants before us place on the operation of this reservoir. Existing carefully-positioned water works are indispensable to efficient water management, particularly in water-short stream systems with great interstate reliance placed on them.[7] Although water available for use in Colorado's

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[6] Of Colorado's nine water compacts, the other two compacts not previously mentioned in this opinion are the Amended Costilla Creek Compact, Pub.L. 88-198, 77 Stat. 350 (1963), § 37-68-101, 15 C.R.S. (1990), and the Animas-La Plata Project Compact, Pub.L. 90-537, 82 Stat. 898 (1968), § 37-64-101, 15 C.R.S. (1990). Two equitable apportionment cases not previously mentioned in which Colorado has an interest are *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945) and *Wyoming v. Colorado*, 353 U.S. 953, 77 S.Ct. 865, 1 L.Ed.2d 906 (1957).

[7] Progressive Conservationists of the late Nineteenth and early Twentieth Centuries viewed reservoirs as an essential means of conservation. *See* Samuel P. Hays, *Conservation and the Gospel of Efficiency: The Progressive Conservation Movement 1890-1920*, at 5 (1959). As of 1990, Colorado reservoirs

Arkansas Valley has been materially increased by the transmountain Frying Pan-Arkansas Project, Pub.L. No. 87-590, 76 Stat. 389 (1962) (previously codified, 43 U.S.C. § 616 (1994)), we have recognized that the use in this state of Arkansas River water is constrained by shortage of available usable supply. *See Southeastern Colo. Water Conservancy Dist. v. City of Florence,* 688 P.2d 715, 716 (Colo.1984). Efficient water management is central to the Arkansas River Compact, the actions of ARCA in administering that Compact, the interests of Colorado and Kansas, and resolution of the case before us.

A.

The Compact was executed between the states and approved by Congress to ensure Colorado and Kansas a secure and lasting apportionment of the waters of the Arkansas River. A water compact is both state and federal law. *Frontier Ditch Co. v. Southeastern Colo. Water Conservancy Dist.,* 761 P.2d 1117, 1123 (Colo.1988). In a prior appropriation state like Colorado, the essential function

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numbered more than 1,900 statewide, with the capability of storing 8.85 million acre-feet of water. Colorado Water Resources Research Institute, Colorado State University, *Colorado's Water: Climate, Supply and Drought* 6 (1990). The state's instream flow program, as of 1990, included Colorado water conservation flow appropriations on 7,002.8 miles of state streams. Dan Merriman, The Colorado Water Conservation Board Program 4 (April 21, 1990) (unpublished paper distributed by Boulder County Bar Association and Natural Resources Law Center, University of Colorado at Boulder, for program on "Water for Instream Needs: Is Colorado Law Adequate?"). *See Board of County Comm'rs v. United States,* 891 P.2d 952, 972 (Colo.1995).

of a compact is to legally protect stream depletions for beneficial use under water rights within the state while making the required interstate deliveries.[8]

In reviewing matters decided upon between states in the course of mutual compact administration, we must not usurp the mechanisms for operation and dispute resolution that are included in the compact. Here, Article VIII of the Arkansas River Compact created ARCA with the power and responsibility for Compact administration and prescription of management procedures, including those applying to John Martin Reservoir. *Kansas v. Colorado*, ___ U.S. at ___, 115 S.Ct. at 1738. Those provisions of the Compact include the following:

> A. To administer the provisions of this compact there is hereby created an interstate agency to be known as the Arkansas river compact administration herein designated as "the administration."
>
> B. The administration shall have power to:
>
> (1) Adopt, amend and revoke by-laws, rules and regulations consistent with the provisions of the compact;
>
> (2) Prescribe procedures for the administration of this compact: Provided, that where such procedures involve the operation of John Martin reservoir project they shall be subject to

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[8] The Congressional approval feature of a compact is particularly important, in that Congress can assent to state laws which might otherwise be invalid as an unreasonable burden on interstate commerce. *See generally*, William Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L.Rev. 387 (1983).

> approval of the district engineer in charge of the said project;
>
> (3) Perform all functions required to implement this compact and to do all things necessary, proper or convenient in the performance of its duties.

In light of this authority, the need to respect resolution of interstate differences, and recognizing that ARCA actions require the consent of both states, we are called upon to uphold those actions of ARCA which forward the purposes of the Compact, do not conflict with its material terms, and accord deference to management decisions that benefit both states and, through them, their water users.

The Compact did not presume that water management through existing and new works would cease upon its execution. To the contrary, the United States Supreme Court has emphasized that Article IV D of the Arkansas River Compact permits:

> future beneficial development of the Arkansas River basin . . . which may involve construction of dams, reservoir and other works for the purposes of water utilization and control, *as well as the improved or prolonged functioning of existing works:* Provided, that the waters of the Arkansas River . . . shall not be depleted in usable quantity or availability. . . .

Kansas v. Colorado, ___ U.S. at ___-___, 115 S.Ct. at 1743-44.

Pursuant to powers vested in it by the Compact, including the Article IV D provision for the "improved or prolonged functioning of existing works," ARCA adopted the 1980 Operating Plan, revised in 1984, by which John

Martin Reservoir conservation storage water is volumetrically allocated to individual Kansas and Colorado user accounts. Although the Operating Plan may be discontinued by either Colorado or Kansas in any year, both states have continued its existence during the past decade of intense conflict between the two throughout the recent *Kansas v. Colorado* compact litigation.

The reason for this notable accord amidst discord is disclosed by the record before us. In the absence of the Operating Plan, no certain portion of waters accruing to reservoir conservation storage could be relied upon by the users of either state. Fearing what others might demand and obtain, users of both states historically scrambled to empty John Martin Reservoir's conservation pool, according to the testimony of former State Engineer Jeris Danielson[9] and the water court's finding.

ARCA determined that the Operating Plan promotes the secure and efficient beneficial use of John Martin water. The trial court found that there was water in the reservoir at the time of the Division Engineer's orders in this case only because the Operating Plan and a related agreement, "Agreement B,"[10] were in effect.

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[9] In his deposition admitted at trial, Jeris Danielson testified: "[I]n the '70s, the states got into a horse race . . . with each other as to who was going to run the most water and run it the fastest. I don't believe that was the intent of the Compact. . . . [T]he state not demanding its share could be shorted, which tended to result in running water from the vessel at . . . large rates. . . . The conservation pool would be empty."

[10] Under a 1984 agreement titled "Agreement B," (referred to as "Amendment B" in the trial court's March 8, 1994 order) an entity having any summer stored water in its account cannot

B.

Highland and Nine Mile claim that the Compact requires imposition of the no-call provision so long as any water they consider to be conservation pool water remains in the reservoir. They ask us to invalidate curtailment orders of the Division Engineer and allow them to make what would otherwise be unaugmented out-of-priority diversions. Highland and Nine Mile argue that two provisions of the Compact should be strictly interpreted to support their affirmative defense against enforcement of the Division Engineer's curtailment orders:

> First, Article V F states, in part:
>
> > *except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this compact,* when there is water in the conservation pool the water users upstream from John Martin reservoir shall not be affected by the decrees to the ditches in Colorado water district 67.

(Emphasis added.) Second, Article V E(2) states: "Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream is authorized by the administration."

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place a call above John Martin against the upstream ditches. "Agreement B," negotiated by the Colorado ARCA representatives of the upstream and downstream ditches, has the effect of substantially delaying such calls. "Agreement B" also delays a district 67 call by providing that any winter water remaining in an account after May 1 of the following compact year automatically becomes summer stored water, which must be then exhausted before that ditch may place a call above John Martin.

Although Highland and Nine Mile argue for strict construction of the compact, endorsing their interpretation would not give proper regard to the language we have underscored above or other language of the Compact. These other provisions, including Article VIII, incorporated by reference into Article V, provide sufficient basis for adoption and implementation of the Operating Plan. Moreover, Article V F anticipates enforcement of priorities within Colorado in providing that ARCA shall notify the Colorado State Engineer, fourteen days in advance, that the "conservation pool will be or is liable to be exhausted," whereupon:

> Colorado shall administer the decreed rights of water users in Colorado water district 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin dam on the basis of relative priorities in the same manner in which their respective priority rights were administered by Colorado before John Martin reservoir began to operate and as though John Martin dam had not been constructed.

The fact that the Compact does not specifically incorporate the Operating Plan and its system of individual accounts for the benefit of Kansas and Colorado is not fatal. ARCA's decision to transfer the water into the accounts in a manner which parallels releases from the reservoir under the Compact's no-call provision substantially affords the benefit contemplated by the Compact for upstream junior priorities.

Highland and Nine Mile note that conservation water under the Operating Plan is "released" into the accounts

and kept in storage rather than being "applied promptly to beneficial use," as provided by Article V E(2). They assume that use of the word "release" in the context of account transfer must trigger the requirement of prompt beneficial use applicable to reservoir releases. While we agree with Highland and Nine Mile that storage is not, of itself, a beneficial use of water,[11] although water impounded can be beneficially applied to fish, recreational, and flood control uses therein,[12] we do not agree that the water transferred into the accounts must then be released from the reservoir immediately and applied to beneficial use.

Article V E(2) of the Compact provides that ARCA may authorize "storage . . . downstream" prior to actual beneficial use. The framers of the Compact therefore anticipated that conservation pool storage could be followed by intervening storage prior to actual beneficial use. Thus, Compact language demonstrates that prompt use does not mean immediate use. The requirement of prompt beneficial use was intended to ensure that actual releases of reservoir water are utilized efficiently and not wasted. When read as a whole with other provisions, this

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[11] *See Handy Ditch Co. v. Greeley & Loveland Irrigation Co.*, 86 Colo. 197, 199, 280 P. 481, 481 (1929).

[12] *See May v. United States*, 756 P.2d 362, 371 (Colo.1988) (fishing), *Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n*, 758 P.2d 164, 173 (Colo.1988) (recreation, fishing, wildlife habitat), *Zigan Sand & Gravel v. Cache La Poudre Water Users Ass'n.*, 758 P.2d 175, 182 (Colo.1988) (wildlife habitat, enhancement of residential environment), *Pueblo West Metro. Dist. v. Southeastern Colo. Water Conservancy Dist.*, 689 P.2d 594, 603 (Colo.1984) (flood control).

provision does not prevent ARCA from invoking its Article VIII powers to adopt and implement the Operating Plan, by which conservation pool water is transferred into individual accounts for subsequent beneficial use, for the benefit of both Kansas and Colorado, in order to avoid a race to empty reservoir conservation storage.

Promptness does not preclude reasonableness. The Compact concept of prompt use is illuminated by the Supreme Court's recognition in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945), that a diversion is to be "followed by an application *within a reasonable time* of the water to a beneficial use." *Id.* at 614, 65 S.Ct. at 1349 (emphasis added). The fundamental function of a water storage right is to divert into storage, followed by beneficial use at a reasonable time in the future.

Utilization of John Martin Reservoir in a more efficient manner is within the purposes of the Compact. Article I recites two major Compact objectives. The first is to settle the apportionment dispute between the states. The second includes realizing "the benefits arising from the construction, operation, and maintenance of the United States of John Martin Reservoir project for water conservation purposes." This second purpose is forwarded by the Operating Plan's allowance for individual accounts in a manner that reasonably provides for beneficial use to occur later, without the necessity of constructing additional downstream storage.

Colorado law favors efficient water management, optimum use, and priority administration.[13] The record before us discloses the role of Colorado water officials in verifying that water is actually placed to beneficial use by the downstream ditch companies under their water rights.[14]

C.

We conclude that the water court was correct in ruling that Colorado priority administration resumes

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[13] *See Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 935 (Colo.1983) (regarding rules and regulations with regard to the Rio Grande Compact). *See also* § 37-92-501(2)(e), 15 C.R.S. (1990) ("[t]hat all rules and regulations shall have as their objective the optimum use of water consistent with preservation of the priority system of water rights.").

[14] William F. Howland, engineering technician for Colorado Division of Water Resources, Division II, who receives orders for John Martin water releases and gives orders to Corps of Engineers personnel to open, close or adjust the gates of John Martin, testified that he visited all of the ditches in water district 67 during the 1993 irrigation season and observed them beneficially using water. Further guardianship regarding beneficial use of John Martin waters was demonstrated by Steven Witte, Division Engineer for Water Division II, with respect to account water. Witte testified that Amity Canal had been the first ditch to request a physical release of account water (that would have triggered the 1993 summer season and release of conservation water into accounts). But Witte had rejected that request because he was not convinced the water would be put to beneficial use. The second request came from Keesee Ditch. Witte was satisfied only after personal physical inspection that Keesee Ditch's request for water was responsive to a legitimate need for the water on April 1.

when ARCA declares the conservation pool to be exhausted by means of measured transfers into individual accounts for the benefit of Kansas and Colorado under the Operating Plan. The conservation pool water was intended under the Compact to be used by Kansas and the downstream ditches in Colorado. Giving effect to Highland and Nine Mile's argument would prolong the Compact's no-call provision to the detriment of the purposes of the Compact, other water users, and Colorado priority administration or, in the alternative, would require resort to the prior practice which promoted inefficient releases from the reservoir.[15]

In reaching this result, based on the record before us, we are confident that Highland, Nine Mile, and other Colorado water users upstream from John Martin Reservoir benefit from the Operating Plan, as do the downstream senior priorities of water district 67. In receiving benefits from Colorado's Compact participation that they would not otherwise have under Colorado law, Highland and Nine Mile cannot prevent Colorado from reasonably acting on behalf of the common good of Colorado water users in Compact administration.[16]

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[15] Duane Helton testified that the conservation pool is increased by the Operating Plan in that the downstream ditch companies cannot demand releases of river flows during the winter storage period, and the downstream ditch companies and Kansas cannot call for releases of storage flow during the summer flow period.

[16] Highland and Nine Mile do not rely on the terms of a stipulation entered as part of a settlement in a water rights judgment and decree, such as that enforced in *United States v. Northern Colo. Water Conservancy Dist.*, 608 F.2d 422, 430 (10th

Highland and Nine Mile would have us set aside the Engineer's curtailment orders. But the duties of state water officials require them to administer the waters of the state in accordance with decreed priorities. § 37-92-301(3), 501, 503, 15 C.R.S. (1990). A decree does not confer but, rather, confirms the existence of a water right arising from the appropriation of state waters and governs administration of the water right in priority[17] vis-a-vis other water rights. *Cresson Consol. Gold Mining & Milling Co.*, 139 Colo. 273, 283, 338 P.2d 278, 283 (1959). Security for the rights of Colorado water users largely depends upon the sound exercise of the Engineer's diversion curtailment enforcement power. Use of these powers by state officials in appropriate circumstances is contemplated by the Compact. Article VI A(2) provides that:

> Except as otherwise provided, nothing in this compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas river in said state as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and

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Cir.1979). Their contentions wholly depend upon interpretation of the Compact.

[17] Its priority is the essential element of a Colorado water right. Under the decreed priority, the owner or beneficiary of a water right is entitled to effectuate capture, possession, and control of a specified quantity of water from the physically available, decreed source of supply at an identified point of diversion for application to beneficial use to the exclusion of all other uses not then operating in decreed priority. *See Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1377-78 (Colo.1982).

use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas river.

The water court found that out-of-priority diversions by Highland and Nine Mile continued at various times between April 30 and October 31, 1993, and deprived downstream users of a total of 7,832.1 acre-feet of water, causing material injury to senior rights. The court found that the Operating Plan did not deprive Highland and Nine Mile of the benefit of the no-call provision of the Compact but only affected its timing and the procedure for its implementation. As these findings are supported by the record and the applicable law, we will not disturb them on appeal.

The assertion of Highland and Nine Mile that the U.S. Army Corps of Engineers failed to approve the Operating Plan, thereby rendering the Plan void, is not correct. The Corps has long been aware of the Operating Plan and has operated John Martin Reservoir continuously in accordance therewith. By its conduct, the Corps has approved the Plan. Reliance placed thereon by Colorado and Kansas is justified. *Cf. Town of Estes Park v. Northern Colo. Water Conservancy Dist.*, 677 P.2d 320, 327-28 (Colo.1984).

IV.

Accordingly, we affirm the water court's judgment enjoining Highland and Nine Mile from continuing to violate the curtailment orders of the Engineer and requiring them to pay an award of costs and reasonable attorney fees.

APPENDIX B

The PEOPLE of the State of Colorado, ex rel. Hal D. SIMPSON, State Engineer, and Steven J. Witte, Division Engineer for Water Division 2, Plaintiffs-Appellees,

v.

The HIGHLAND IRRIGATION COMPANY, a mutual ditch company, and The Nine Mile Canal Company, a mutual ditch company, Defendants-Appellants.

No. 94SA136.

Supreme Court of Colorado,
En Banc.

April 10, 1995.

As Modified on Denial of Rehearing
April 24, 1995.

Justice VOLLACK delivered the Opinion of the Court.

Defendants-Appellants The Highland Irrigation Company and The Nine Mile Canal Company (the defendants) appeal a ruling by the District Court, Water Division 2 (the water court), which enjoined the defendants from diverting water in contradiction to the orders of the Division Engineer for Water Division 2 (the division engineer). The water court held that the defendants were without standing to assert, as an affirmative defense to the injunction action initiated by the People of the State of Colorado (the State), that the division engineer's curtailment orders were invalid.

We find that the water court erred in concluding that the defendants lacked standing to pursue their affirmative defense. We therefore reverse and remand the case for further proceedings.

I.

This case involves a dispute over the administration of water rights on the Arkansas and Purgatoire Rivers in southeastern Colorado.[1] The defendants are two mutual ditch companies which divert water upstream from the John Martin Reservoir on the Purgatoire River. In order to focus the issue in this case, it is necessary to give some background in how these waters are managed. The administration of water rights along both rivers is affected by an agreement between Kansas and Colorado called the Arkansas River Compact (the Compact). The Compact was intended to settle disputes between Kansas and Colorado over water in the Arkansas River, to allocate water between the two states, and to promote the efficient administration of the John Martin Reservoir for the benefit of both states. *See* Arkansas River Compact, ch. 155, art. I, 63 Stat. 145 (1949); § 37-69-101(art. I), 15 C.R.S. (1990).[2]

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[1] The Purgatoire River feeds into the Arkansas river just west of the John Martin Reservoir near Las Animas, Colorado.

[2] The Compact was approved by Congress in 1949, as is required under article I, § 10(2), of the United States Constitution. Arkansas River Compact, ch. 155, 63 Stat. 145 (1949). The Compact is codified in Colorado at §§ 37-69-101 to -106, 15 C.R.S. (1990); hereafter, all citations to the Compact will be to the Colorado Revised Statutes.

The Arkansas River Compact Administration (ARCA), an interstate agency created by the Compact, has authority to administer the provisions of the Compact. In particular, the ARCA has the power to adopt rules and regulations consistent with the Compact, to prescribe procedures for the administration of the Compact, and to perform all necessary and proper functions for its implementation. The ARCA is comprised of three representatives each from Colorado and Kansas, and every decision of the ARCA must be unanimous. § 37-69-101(art. VIII)(D), 15 C.R.S. (1990).

The Compact itself provides a fairly straight-forward method for administering water that enters John Martin Reservoir. For purposes of water storage and release, the calendar year is divided into two storage periods: a winter storage period and a summer storage period. Winter storage commences on the first of November of each year and continues through the last day of March. During the winter storage period, all of the water entering the John Martin Reservoir is stored.[3] § 37-69-101(art. V)(A), 15 C.R.S. (1990). The summer storage period commences on the first of April, and continues through the end of October. Generally speaking, water entering the reservoir during the summer storage period is also stored. Under the terms of the Compact, both Colorado water users downstream from the John Martin Reservoir, and Kansas, can demand a release of stored water beginning April 1 of each year, the beginning of the summer storage period, in

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[3] Colorado may demand a release of water equivalent to the water flow, not to exceed 100 cubic feet per second. § 37-69-101(art. V)(A), 15 C.R.S. (1990).

amounts not to exceed a specified rate. § 37-69-101(art. V)(C), 15 C.R.S. (1990). Neither Kansas nor Colorado is given a specific volume of water. Instead, the Compact employs a common pool concept, which means that the water can be released to Colorado and Kansas on demand, limited only by the Compact requirement that any release of water be applied "promptly to beneficial use." § 37-69-101(art. V)(E)(2), 15 C.R.S. (1990).

Water entering the John Martin Reservoir is stored in the reservoir's "conservation pool." The conservation pool is defined by the Compact as that portion of the total storage space in the reservoir which is not reserved for flood control purposes. § 37-69-101(art. III)(F), 15 C.R.S. (1990). The Compact contemplates that the conservation pool may be exhausted at some point during the year. In that event, the Compact provides for Colorado to administer the water rights of the ditches downstream from the John Martin Reservoir (Colorado water district 67 users)[4]

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[4] The Compact specifically refers to the water rights of the users in Colorado water district 67. § 37-69-101(art. V)(F), 15 C.R.S. (1990). The "ditches of Colorado water district 67" are defined in the Compact as "those ditches and canals which divert water from the Arkansas river or its tributaries downstream from John Martin dam for irrigation use in Colorado." § 37-69-101(art. III)(G), 15 C.R.S. (1990).

In 1969, the Colorado legislature reorganized the system for water rights administration, creating seven water divisions within the state, and eliminating the previous water districts. Ch. 373, secs. 1 to 24, §§ 37- 92-101 to -602, 1969 Colo.Sess.Laws 1200-1224. The downstream users whose superior water rights were allegedly infringed are located in former water district 67. In this opinion, we refer to those users as Colorado water district 67 users.

under the priority system, until such time as water is available for release in the conservation pool. § 37-69-101(art. V)(F), 15 C.R.S. (1990). Accordingly, a water user in Colorado water district 67 who has priority can make a call for water against both Colorado water district 67 users, and against users upstream from the John Martin Reservoir. The Compact also specifically provides that, "when there is water in the conservation pool[,] the water users upstream from John Martin [R]eservoir shall not be affected by the decrees to the ditches in Colorado water district 67." *Id.*[5]

In 1980, the ARCA adopted an Operating Plan for the John Martin Reservoir (the Operating Plan), which modifies the administration of the John Martin Reservoir under the Compact. As revised in 1984, the Operating Plan replaces the common pool concept included in the Compact with a system of water accounts. Under the Operating Plan, Colorado water district 67 users, and Kansas, are given the equivalent of savings accounts for water. Beginning the first of April, but no later than April 7 at 8:00 a.m., the stored water, or "conservation storage," is "released" into those accounts: forty percent for Kansas accounts, and sixty percent for Colorado water district 67

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[5] *See also* § 37-69-101(art. V)(D), 15 C.R.S. (1990), which provides:

> Releases authorized by paragraphs A, B, and C of this article, except when all Colorado water users are operating under decree priorities as provided in paragraphs F and G of this article, *shall not impose any call on Colorado water users that divert waters of the Arkansas river upstream from John Martin dam.*

(Emphasis added.)

accounts. When water is "released" into the accounts pursuant to the Operating Plan, it is not physically released from the reservoir, but is rather transferred on paper for accounting purposes. Once all of the conservation storage has been transferred to accounts, the Operating Plan provides that, for the purposes of the Compact, "the conservation pool shall be *deemed exhausted*." (Emphasis added.) Since the conservation pool is deemed empty, Colorado water district 67 users, when they have a priority water right, can make a call against a water user upstream from the John Martin Reservoir under the Operating Plan, even though the reservoir might still physically contain storage water.

After the terms of the Operating Plan were initiated, some of the water users upstream from John Martin Reservoir apparently became concerned that they were subject to earlier calls under the Operating Plan than they had been before the Operating Plan. Those upstream ditches and the Colorado water district 67 users thereafter entered into an agreement which affected the administration of water under the Operating Plan with respect to when the downstream ditches could make a call through the reservoir to the upstream users (Agreement B).[6] Specifically, Agreement B provides that, as long as the downstream ditches have summer storage water in their accounts, the ditches cannot place a call upstream for water. Agreement B also provides that any water in a ditch's winter storage account which is not used by May 1 is automatically converted to summer storage water on that date.

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[6] The defendants were not signatories to the agreement.

II.

The circumstances giving rise to this case occurred in 1993. Each defendant owns water rights which are junior in priority to ditches downstream from the reservoir in Colorado water district 67. On April 26, 1993, the division engineer, acting on a call for water by three senior downstream ditches, issued an order under section 37-92-502, 15 C.R.S. (1990),[7] for the defendants to curtail their water diversions under their junior priorities. The defendants did not comply with the orders, and instead continued to divert water.

On May 13, 1993, the State filed complaints in the water court pursuant to section 37-92-503, 15 C.R.S. (1990), asking for preliminary and permanent injunctive relief against the defendants. The State alleged that the out-of-priority diversions by the defendants had caused material injury to downstream users with senior water rights.

In response, the defendants asserted an affirmative defense, arguing that the Operating Plan was not a lawful

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[7] Section 37-92-501(1), 15 C.R.S. (1990), gives authority to the state engineer and the division engineers to "administer, distribute, and regulate the waters of the state" in accordance with state law. In order to implement the provisions of § 37-92-501(1), the state engineer and the division engineers may issue orders preventing a water user from making diversions of water out of priority. § 37-92-502, 15 C.R.S. (1990). In the event that a water user does not comply with an order made by the state engineer or a division engineer under § 37-92-502, the State, on behalf of the engineers, may seek an injunction, preventing the water user from further violations of the order. § 37-92-503, 15 C.R.S. (1990).

basis for the State's curtailment orders because the Operating Plan was in direct violation of the terms of the Compact.[8] Therefore, the defendants argued, the division engineer's orders, which were made pursuant to the Operating Plan, were unenforceable. The defendants also filed a notice of removal in the United States District Court for the District of Colorado (the federal district court) pursuant to 28 U.S.C. § 1441(b) (1988). They maintained that the State's complaint could properly be removed to the federal district court since the lawfulness of the orders under the Compact was a question of federal law.[9]

The State objected to the removal and filed a motion with the federal district court requesting a remand of the case to the water court under 28 U.S.C. § 1447(c) (1988). The State's position was that there was no basis for federal jurisdiction over the case. The federal district court agreed, and on August 12, 1993, remanded the case

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[8] The defendants' other affirmative defenses are not at issue in this case.

[9] The defendants made a previous attempt to challenge the validity of the Operating Plan in federal district court. On June 8, 1992, the defendants filed a complaint in the federal district court, seeking a declaratory judgment that the Operating Plan was *ultra vires* and unenforceable under the terms of the Compact. The federal district court stayed proceedings in that case pending the outcome of *Kansas v. Colorado*, No. 105, Original (U.S.1985 Term). *Highland Irrigation Co., et al. v. The Arkansas River Compact Admin.*, No. 92-C-1151 (D.Colo. Aug. 20, 1992). Although *Kansas v. Colorado* was recently argued in the United States Supreme Court, the *Highland Irrigation* case in federal district court has apparently been closed.

to the water court, finding that the validity of the curtailment orders under the Compact, although it was a defense based on federal law, was not an essential element of the State's case. *People ex rel. Simpson v. Nine Mile Canal Co.*, 828 F.Supp. 823 (D.Colo.1993).

Shortly thereafter the parties filed cross-motions for summary judgment in the water court. The defendants argued that the curtailment orders were invalid as a matter of law because they were contrary to the terms of the Compact. The State, in contrast, argued that the defendants did not have standing to challenge the validity of the Operating Plan because the defendants could not establish a causal connection between their injury and the Operating Plan and because they failed to show that any injury would be redressed by invalidating the Operating Plan. In the alternative, the State argued that the Operating Plan was a valid exercise of the ARCA's authority under the Compact.

On November 2, 1993, the water court denied the parties' motions for summary judgment. In its order, the water court also held that the defendants would have to prove at trial that they had standing to assert their affirmative defense, including actual injury, causation, and redressability, under federal standing principles.

Before trial, the defendants filed a second motion for summary judgment. The defendants argued that the Operating Plan and the curtailment orders issued thereunder were invalid as a matter of law because the Army Corps of Engineers had not approved of the changes encompassed in the Operating Plan, as was required

under the Compact. The water court denied the motion and the case proceeded to trial.

At the trial, the State called several witnesses who explained the process of water rights administratior under the Compact, the Operating Plan, and Agreement B. The State introduced evidence to establish that the defendants' out-of-priority diversion of water caused material injury to the downstream ditches with senior water rights. The State also introduced evidence to show that the defendants were not injured by the Operating Plan because they were not subjected to more frequent calls for water than they had been before the Operating Plan.

Through cross-examination of the State's witnesses, the defendants elicited testimony to establish that the downstream ditches' call for water against the defendants would have been delayed for a couple of weeks to a month if the downstream ditches had used the water actually stored in the John Martin Reservoir in April 1993. Additionally, a shareholder of one of the defendants testified that, as early as 1984, he was advised by an ARCA member that the Operating Plan was "probably contrary to law," that the defendants' water rights could possibly be damaged by the Operating Plan, and that one way for the defendants to challenge the Operating Plan would be to refuse to obey curtailment orders under the Operating Plan.

On March 8, 1994, the water court issued its decision, ruling that the defendants did not have standing to assert the invalidity of the Operating Plan as an affirmative

defense at trial. The water court found that the defendants failed to prove that throughout the irrigation season they were curtailed more frequently than if the Operating Plan was not in place. The water court therefore concluded that the defendants failed to show redressability. In reaching this conclusion, the water court noted that deposition testimony indicated that, but for the Operating Plan and Agreement B, the John Martin Reservoir would typically be completely empty during the first part of April of each year, initiating an earlier call on the defendants than under the Operating Plan and Agreement B. Because of its ruling on lack of standing to assert the affirmative defense, the water court did not reach the issue of the validity of the Operating Plan. The water court upheld the orders of the division engineer and enjoined the defendants from violating the orders in the future. The court also awarded to the State attorney fees, expert fees, and costs in the amount of $42,638.20.

III.

The sole issue on appeal is whether the water court erred in finding that the defendants did not have standing to litigate their affirmative defense that the curtailment orders issued by the division engineer pursuant to the Operating Plan and Agreement B were invalid because they were in violation of the terms of the Compact. The water court found that the defendants lacked standing because they were not harmed, but rather were benefited by the Operating Plan and Agreement B. We disagree with the water court and conclude that the defendants have standing to assert the invalidity of the

curtailment orders as a basis for their defense to the State's suit for injunction.

The water court's and the parties' emphasis on standing in this case is extremely unusual, because the issue of standing normally arises in the context of the *plaintiff's* standing to sue, and not the defendant's standing to defend against suit. *See* 13 Charles Alan Wright, Arthur R. Miller & Edward Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3531, at 339-40 (1984) (noting that the party focused upon, for the standing question, is almost invariably the plaintiff). The majority of cases relied upon by the water court and the parties for determining whether the defendants established standing in this case are cases in which the plaintiff's standing to sue was challenged, not the defendant's standing to assert an affirmative defense. The difficulty with extending the traditional notion of plaintiff standing to defendants is that defendants ordinarily are simply attempting to defend against suit, as here, and are not seeking independent affirmative relief. In other words, the defendants are only in court because the State, as plaintiff, put them there.

In the context of plaintiff's standing, we have repeatedly held that the plaintiff has standing *to sue* if there is injury in fact, *Board of County Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1052 (Colo.1992), and if the injury is to a legally protected right or interest. *Id.* at 1052. This requirement limits plaintiffs from asserting claims in which they have no stake, and ensures that the jurisdiction of the courts is exercised only when an actual case or controversy exists. *Colorado Gen. Assembly v. Lamm*, 700 P.2d 508, 515-16 (Colo.1985). Those same concerns are not

implicated with respect to the defendants, because once the plaintiff has established standing and the defendants have been haled into court by the plaintiff, the only role for the defendants is to defend against the suit. The defendants' affirmative defense does not constitute an independent cause of action, but is a defensive claim only. Therefore, the rules for determining whether a plaintiff has standing are simply inapplicable to the defendants in this case.

It is clear to us that the defendants have standing as a matter of course to defend against the State's injunction action and that the water court's standing analysis with respect to the defendants was misplaced. The defendants are merely attempting to avoid the injunction stemming from the curtailment orders. As such, they are seeking only to have the action for an injunction dismissed because, they argue, the curtailment orders of the division engineer, made pursuant to the Operating Plan and Agreement B, violate the terms of the Compact. In essence, the defendants are arguing that the division engineer's orders are void and that the orders therefore cannot serve as the basis for the State's injunction action.

We acknowledge that, in certain circumstances, a defendant who challenges an enforcement action may lack standing to assert an affirmative defense to governmental action. However, those cases in which a defendant was found to lack standing usually involve a *criminal* defendant's attempt to challenge the statute or ordinance on the ground that the provision is unconstitutionally overbroad. *See, e.g., People v. Heitzman*, 852 P.2d 443, 447 (Colo.1993) (holding that the defendant did not have standing to challenge the constitutionality of a statutory

provision limiting the right of criminal defendants to attack their convictions after losing on appeal, because the defendant never appealed his conviction); *People v. Fuller*, 791 P.2d 702, 709 (Colo.1990) (finding that the defendant did not have standing to challenge the constitutionality of the statute providing for a defense of impaired mental condition, because he did not raise the defense); *see also People v. Rankin*, 724 P.2d 1354, 1356 (Colo.1986).

The criminal defendants lacked standing in those cases because they did not allege that their own constitutional rights were violated, in which case they would clearly have standing, but instead asserted the interests of third parties who were not before the court. *See Heitzman*, 852 P.2d at 447 (quoting *People v. Stage*, 195 Colo. 110, 112, 575 P.2d 423, 424 (1978)) (" '[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.' ").[10]

Those cases are thus wholly inapplicable to the situation here, in which the defendants are asserting their own interests in the administration of their water rights in accord with the terms of the Compact. The defendants

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[10] The prohibition against third-party standing will generally prevent a party from making the claims of third parties who are not involved in the lawsuit. However, we have allowed third-party standing in the context of overbreadth challenges to statutes which threaten fundamental constitutional rights, i.e., First Amendment rights. *See, e.g., Ferguson v. People*, 824 P.2d 803, 807-08 (Colo.1992); *People in the Interest of J.M.*, 768 P.2d 219, 224 (Colo.1989).

clearly have some interest in the administration of their water rights under the Compact since the State's enforcement proceeding is entirely predicated on the assertion that the Compact gives the ARCA authority to enter into the Operating Plan, which in turn purportedly gives the division engineer authority to curtail the defendants' diversions. Since the defendants asserted an appropriate basis for their affirmative defense, it was not necessary for the water court to get embroiled in the issue of whether the Operating Plan and Agreement B function to the ultimate benefit or detriment of the defendants. That issue need not even be decided on the merits of the defendants' affirmative defense.

IV.

We conclude that the defendants have standing to assert their affirmative defense. Accordingly, we reverse the judgment of the water court and remand for further proceedings.

APPENDIX C

DISTRICT COURT, WATER DIVISION 2, COLORADO

CASE NO. 93CW24

ORDER

THE PEOPLE OF THE STATE OF COLORADO, ex rel. HAL D. SIMPSON, State Engineer, and STEVEN J. WITTE, Division Engineer for Water Division,

Plaintiffs,

v.

THE HIGHLAND IRRIGATION COMPANY, a mutual ditch company, and THE NINE MILE CANAL COMPANY, a mutual ditch company,

Defendants.

This matter came before the Court for trial on February 15 and 16, 1994. Plaintiffs were represented by First Assistant Attorney General Wendy C. Weiss. Defendants were represented by their attorney Wayne B. Schroeder. The Court now finds and concludes as follows.

1. This is a consolidated action under section 37-92-503, 15 C.R.S., as amended, for an injunction to enforce orders of the Division Engineer issued under section 37-92-502, 15 C.R.S., as amended.

2. This case involves "water of the state," as that term is defined and used in the Water Right Determination and Administration Act of 1969, section 37-92-101 *et seq.*, 15 C.R.S., as amended, and this Court has jurisdiction over the subject matter of and parties to this action.

3. Hal D. Simpson is the State Engineer and has served in that capacity at all times relevant hereto.

4. Steven J. Witte is the Division Engineer for Water Division 2 and has served in that capacity at all times relevant hereto.

5. The Highland Irrigation Company is a mutual ditch company organized and operating under the laws of the State of Colorado and owns the following decreed water rights out of the Purgatoire River in Water District 17:

(1) priority – May 31, 1866 amount – 16.6 c.f.s.

(2) priority – April 1, 1884 amount – 7.4 c.f.s.

(3) priority – March 1, 1909 amount – 38.5 c.f.s.

6. The Nine Mile Canal Company is a mutual ditch company organized and operating under the laws of the State of Colorado and owns the following decreed water rights in the Purgatoire River in Water district 17:

(1) priority – May 10, 1887amount – 18.0 c.f.s.

(2) priority – July 1, 1930amount – 57.0 c.f.s.

7. The Lamar, the Keesee, and the Amity ditches hold water rights that are senior to Highland's 1909 right and both of Nine Mile's rights. On April 26, 1993, state water officials were trying to deliver water to those three ditches, while water was being diverted by Nine Mile and by Highland under its 1909 right.

8. On April 26, 1993, at approximately 7:15 a.m., William Howland, Engineering Technician, an employee of the Colorado Division of Water Resources, gave an oral order to Highland's ditch rider to immediately curtail

diversions of water under Highland's 1909 priority. Later that morning, Kenney Wagner, secretary of Highland, and Wayne Schroeder, attorney for Highland, made separate phone calls to Mr. Howland to verify the order.

9. On April 26, 1993, at approximately 7:35 a.m., William Howland gave an oral order to Nine Mile's ditch rider to immediately curtail all diversions of water. Later that morning, John Kenney, a director of Nine Mile, and Wayne Schroeder, attorney for Nine Mile, made separate phone calls to Mr. Howland to verify the order.

10. The Division Engineer issued a written order to Highland, dated April 27, 1993, confirming Mr. Howland's oral order. The written order was sent to Harold Morlan, president of Highland, by certified mail and was received by him on April 29, 1993.

11. The Division Engineer issued a written order to Nine Mile, dated April 27, 1993, confirming Mr. Howland's oral order. The written order was sent to Carson McCloy, president of Nine Mile, by certified mail and was received by him on or before May 7, 1993.

12. In recognition of the fact that the calling senior water right would change during the irrigation season, the Division Engineer's written orders required Highland and Nine Mile to comply with all future orders to totally or partially discontinue diversions.

13. During the irrigation season the calling water right did, in fact, change. The changing call sometimes affected which of Highland's and Nine Mile's rights were in priority and entitled to divert.

14. At various times between April 30 and October 31, 1993, Highland and Nine Mile diverted water contrary to the oral and written orders of the Division Engineer or his employees. Diversions in violation of those orders, calculated on a daily basis taking into account the calling right for each day, total approximately 3406.7 acre-feet of water diverted by Highland and approximately 4425.4 acre-feet of water diverted by Nine Mile.

15. The water diverted by Highland and Nine Mile in violation of those orders was required by persons entitled to use water under water rights having senior decreed priorities, and Highland's and Nine Mile's diversions caused material injury to such senior water rights.

16. Absent a court order enjoining Highland and Nine Mile from violating the Division Engineer's orders, Highland and Nine Mile will continue to divert water required by persons entitled to use water under water rights having senior decreed priorities and will continue to cause material injury to such senior water rights.

17. Under the terms of the Arkansas River Compact, 37-69-101, ff., 15 C.R.S., as amended, water is stored in John Martin Reservoir from November through the end of March and is designated "conservation storage." At the end of March water in conservation storage may be called from the reservoir. When the conservation storage has been completely exhausted, downstream users may then call through the reservoir, according to the priority system, for water which is being diverted by upstream users. The upstream users must then cease diverting water and allow water to flow downstream to the calling

senior users. Similar provisions were made for the storage and release of summer conservation storage.

18. In 1980 the Arkansas River Compact Administration adopted a Resolution Concerning An Operating Plan for John Martin Reservoir. Pursuant to the 1980 Operating Plan conservation storage water is not actually released from the reservoir, but is reclassified into several different accounts, which are held by the users in Water District 67, which is located downstream. The conservation pool is then deemed to be empty, and as a result the District 67 users may immediately call out water belonging to upstream users, while they bank water in the reservoir for future use. In addition, under a 1984 agreement titled Agreement "B", negotiated by Water District 14 and 17 and Water District 67 Arkansas River Compact Administration representatives and upstream and downstream ditches and administered by the Division Engineer, summer stored conservation water is also placed into accounts. These modifications of the Arkansas River Compact permit a more efficient utilization of water, and the time when senior downstream calls will affect upstream calls is delayed.

19. Defendants asserted as an affirmative defense that the Division Engineer's orders were illegal, because priority administration was commenced when the conservation pool was deemed exhausted under the 1980 Operating Plan, and they contend that the Operating Plan conflicts with the Compact and, therefore, is illegal.

20. By Court Order of November 2, 1993 the Defendants were required to prove standing to raise the affirmative defense, which includes proving that the

Operating Plan causes them injury and that a favorable decision would redress that injury.

21. Although there was evidence that in the absence of the 1980 Operating Plan and Amendment "B" there might have been a one-time immediate benefit to defendants in April of 1993, that is not sufficient. The situation must be viewed over a longer term. Defendants have not proved that throughout the irrigation season they are curtailed more frequently under the Operating Plan than they would be without it and that they are likely to be curtailed less frequently in the future if the Operating Plan is declared invalid. According to the deposition testimony of Dr. Jeris Danielson, former State Engineer, without the Operating Plan there would be a race between Colorado and Kansas to run the most water and run it the fastest. This race would result in the reservoir being empty during the first two weeks of April. Based on the history of John Martin Reservoir prior to the 1980 Operating Plan, there was water in the reservoir at the time of the Division Engineer's orders in this case only because the Operating Plan and Amendment "B" were in effect. Without the Operating Plan and Amendment "B" the Defendants would be called out more frequently. To allow Defendants to prevail on their affirmative defense would be detrimental to them in the long-run. Therefore, there is no redressability and no standing.

22. Since the Defendants do not have standing to raise the validity of the 1980 Operating Plan as a defense to this action, there is no need for the Court to consider its validity.

NOW, THEREFORE, IT IS ORDERED that the orders of the Division Engineer are upheld and the Defendants are enjoined from continuing to violate such orders in the future.

IT IS FURTHER ORDERED that the Defendants shall pay the costs of this proceeding, including reasonable attorneys fees.

DONE BY THE COURT this 8th day of March, 1994.

/s/ John R. Tracey
JOHN R. TRACEY,
WATER JUDGE

APPENDIX D

DISTRICT COURT, WATER DIVISION 2, COLORADO

CASE NO. 93CW24

ORDER

THE PEOPLE OF THE STATE OF COLORADO, ex rel. HAL D. SIMPSON, State Engineer, and STEVEN J. WITTE, Division Engineer for Water Division 2,

Plaintiffs,

v.

THE HIGHLAND IRRIGATION COMPANY, a mutual ditch company, and THE NINE MILE CANAL COMPANY, a mutual ditch company,

Defendants.

THIS MATTER comes before the Court on Defendants' Motion to Dismiss and the State Engineer's Motion for Entry of Judgment, this matter having been remanded by the Supreme Court for further proceedings, Case No. 94SA136. Findings of fact have previously been made by this Court by its order of March 8, 1994, and will not be repeated.

The issue is whether the Arkansas River Compact gives to the Compact Administration the authority to enter into the 1980 Operating Plan and whether that Plan was approved by the Corps of Engineers. The Defendants state the issue more narrowly: Whether Plaintiffs are empowered by state law with authority to issue a Section 502 order to curtail upstream junior water rights for the benefit of District 67 water users who are banking for

later use their own winter and summer conservation water and individual accounts in the conservation pool in John Martin Reservoir, or whether the conservation pool water has to be physically released and applied to beneficial use before Distinct 67 users can demand water pursuant to Defendants' rights.

The 1980 Operating Plan and Amendment B clearly carry out the intentions stated in the Arkansas River Compact Article IV C.(3) that the conservation pool be operated for the benefit of water users in Colorado and Kansas, both upstream and downstream from John Martin Dam. The Operating Plan and Amendment B are not contrary to the Compact or in violation of the Compact. Defendants complain that the Operating Plan deprives them of the no-call provision of the Compact. The Plan does deprive them of that provision, but only regulates the timing of its operation.

When the water is transferred into individual accounts and the conservation pool is deemed exhausted so that water rights above and below John Martin are administered in priority, the water is "released" and applied to beneficial use just as surely as water that is physically diverted and placed in storage for subsequent application for agricultural, industrial, or municipal uses. As the Plaintiffs state in their opening brief on page 9, footnote 10: "Accounting transactions are common under Colorado water law. For example, exchanges frequently involve transferring water between reservoirs on different streams on the State Engineer's records, where the physical transfer of water would be impossible. Similarly, dominion over imported or nontributary water may be maintained by means of accounting, even though the

molecules of water have become commingled with, and inseparable from, native flows. *See, e.g., Public Service Co. v. Willows Water Dist.*, 856 P.2nd 829 (Colo. 1993)."

Defendants also complain that the Corps of Engineers never approved the Operating Plan. It is undisputed that the Corps knowingly operated John Martin Reservoir in accordance with the Operating Plan without objection since its adoption. This long conduct unquestionably establishes the approval of the Corps. Some formal written statement would add nothing to the many years of conduct in conformity with the Operating Plan.

Therefore, the Defendants' Motion to Dismiss is denied and the Plaintiffs' Motion for Entry of Judgment is granted, the Operating Plan and Amendment B not being contrary to law or in violation of the Arkansas River Compact, and the orders of the Division Engineer are upheld and the Defendants are enjoined from continuing to violate such orders in the future. Defendants shall pay the costs of this proceeding, including reasonable attorneys fee, as previously ordered.

DONE BY THE COURT this 3rd day of July, 1995.

/s/ John R. Tracey
JOHN R. TRACEY,
WATER JUDGE

APPENDIX E

DISTRICT COURT, WATER DIVISION 2, COLORADO

CASE NO. 93CW24

ORDER

THE PEOPLE OF THE STATE OF COLORADO, ex rel. HAL D. SIMPSON, State Engineer, and STEVEN J. WITTE, Division Engineer for Water Division 2,

Plaintiffs,

v.

THE HIGHLAND IRRIGATION COMPANY, a mutual ditch company, and THE NINE MILE CANAL COMPANY, a mutual ditch company,

Defendants.

THIS MATTER comes before the Court on the Motion of the State Engineer and the Division Engineer to correct a typographical error in the Court's Order of July 3, 1995. The Court orders as follows.

The Motion is granted, and the last sentence of the first full paragraph on page 2 of the Order of July 3, 1995 is amended to read as follows: "The Plan does not deprive them of that provision, but only regulates the timing of its operation."

DONE BY THE COURT this 25th day of July, 1995.

/s/ John R. Tracey
JOHN R. TRACEY,
WATER JUDGE

APPENDIX F

ARKANSAS RIVER COMPACT, 1948

The State of Colorado and the State of Kansas, parties signatory- to this Compact (hereinafter referred to as "Colorado" and "Kansas", respectively, or individually as a "State", or collectively as the "States") having resolved to conclude a compact with respect to the waters of the Arkansas River, and being moved by considerations of interstate comity, having appointed commissioners as follows: "Henry C. Vidal, Gail L. Ireland, and Harry B. Mendenhall, for Colorado; and George S. Knapp, Edward F. Arn, William E. Leavitt, and Roland H. Tate, for Kansas"; and the consent of the Congress of the United States to negotiate and enter into an interstate compact not later than January 1, 1950, having been granted by Public Law 34, 79th Congress, 1st Session, and pursuant thereto the President having designated Hans Kramer as the representative of the United States, the said commissioners for Colorado and Kansas, after negotiations participated in by the representatives of the United States, have agreed as follows:

ARTICLE I

The major purposes of this Compact are to:

A. Settle existing disputes and remove causes of future controversy between the States of Colorado and Kansas, and between citizens of one and citizens of the other State, concerning the waters of the Arkansas River and their control, conservation and utilization for irrigation and other beneficial purposes.

B. Equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes.

ARTICLE II

The provisions of this Compact are based on (1) the physical and other conditions peculiar to the Arkansas River and its natural drainage basin, and the nature and location of irrigation and other developments and facilities in connection therewith; (2) the opinion of the United States Supreme Court entered December 6, 1943, in the case of *Colorado v. Kansas* (320 U.S. 383) concerning the relative rights of the respective States in and to the use of waters of the Arkansas River; and (3) the experience derived under various interim executive agreements between the two States apportioning the waters released from the John Martin Reservoir as operated by the Corps of Engineers.

ARTICLE III

As used in this Compact:

A. The word "Stateline" means the geographical boundary line between Colorado and Kansas.

B. The term "waters of the Arkansas River" means the waters originating in the natural drainage basin of the Arkansas River, including its tributaries, upstream from

the Stateline, and excluding waters brought into the Arkansas River Basin from other river basins.

C. The term "Stateline flow" means the flow of waters of the Arkansas River as determined by gaging stations located at or near the Stateline. The flow as determined by such stations, whether located in Colorado or Kansas, shall be deemed to be the actual Stateline flow.

D. "John Martin Reservoir Project" is the official name of the facility formerly known as Caddoa Reservoir Project, authorized by the Flood Control Act of 1936, as amended, for construction, operation and maintenance by the War Department, Corps of Engineers, later designated as the Corps of Engineers, Department of the Army, and herein referred to as the "Corps of Engineers". "John Martin Reservoir" is the water storage space created by "John Martin Dam".

E. The "flood control storage" is that portion of the total storage space in John Martin Reservoir allocated to flood control purposes.

F. The "conservation pool" is that portion of the total storage space in John Martin Reservoir lying below the flood control storage.

G. The "ditches of Colorado Water District 67" are those ditches and canals which divert water from the Arkansas River or its tributaries downstream from John Martin Dam for irrigation use in Colorado.

H. The term "river flow" means the sum of the flows of the Arkansas and the Purgatoire Rivers into John Martin Reservoir as determined by gaging stations appropriately located above said Reservoir.

I. The term "the Administration" means the Arkansas River Compact Administration established under Article VIII.

ARTICLE IV

Both States recognize that:

A. This Compact deals only with the waters of the Arkansas River as defined in Article III.

B. This Compact is not concerned with the rights, if any, of the State of New Mexico or its citizens in and to the use in New Mexico of waters of Trinchera Creek or other tributaries of the Purgatoire River, a tributary of the Arkansas River.

C. (1) John Martin Dam will be operated by the Corps of Engineers to store and release the waters of the Arkansas River in and from John Martin Reservoir for its authorized purposes.

(2) The bottom of the flood control storage is presently fixed by the Chief of Engineers, U.S. Army, at elevation 3,851 feet above mean sea level. The flood control storage will be operated for flood control purposes and to those ends will impound or regulate the streamflow volumes that are in excess of the then available storage capacity of the conservation pool. Releases from the flood control storage may be made at times and rates determined by the Corps of Engineers to be necessary or advisable without regard to ditch diversion capacities or requirements in either or both States.

(3) The conservation pool will be operated for the benefit of water users in Colorado and Kansas, both

upsteam and downstream from John Martin Dam, as provided in this Compact. The maintenance of John Martin Dam and appurtenant works may at times require the Corps of Engineers to release waters then impounded in the conservation pool or to prohibit the storage of water therein until such maintenance work is completed. Flood control operation may also involve temporary utilization of conservation storage.

D. This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purposes of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction.

ARTICLE V

Colorado and Kansas hereby agree upon the following basis of apportionment of the waters of the Arkansas River:

A. Winter storage in John Martin Reservoir shall commence on November 1st of each year and continue to and include the next succeeding March 31st. During said period all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water

equivalent to the river flow, but such releases shall not exceed 100 c.f.s. (cubic feet per second) and water so released shall be used without avoidable waste.

B. Summer storage in John Martin Reservoir shall commence on April 1st of each year and continue to and include the next succeeding October 31st. During said period, except when Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water equivalent to the river flow up to 500 c.f.s., and Kansas may demand releases of water equivalent to that portion of the river flow between 500 c.f.s. and 750 c.f.s., irrespective of releases demanded by Colorado.

C. Releases of water stored pursuant to the provisions of paragraphs A and B of this Article shall be made upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period. Unless increases to meet extraordinary conditions are authorized by the Administration, separate releases of stored water to Colorado shall not exceed 750 c.f.s., separate releases of stored water to Kansas shall not exceed 500 c.f.s., and concurrent releases of stored water shall not exceed a total of 1,250 c.f.s.: Provided, that when water stored in the conservation pool is reduced to a quantity less than 20,000 acre-feet, separate releases of stored water to Colorado shall not exceed 600 c.f.s., separate releases of stored water to Kansas shall not exceed 400 c.f.s., and concurrent releases of stored water shall not exceed 1,000 c.f.s.

D. Releases authorized by paragraphs A, B and C of this Article, except when all Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, shall not impose any call on Colorado water users that divert waters of the Arkansas River upstream from John Martin Dam.

E. (1) Releases of stored water and releases of river flow may be made simultaneously upon the demands of either or both States.

(2) Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream is authorized by the Administration.

(3) Releases of river flow and of stored water to Colorado shall be measured by gaging stations located at or near John Martin Dam and the releases to which Kansas is entitled shall be satisfied by an equivalent in Stateline flow.

(4) When water is released from John Martin Reservoir appropriate allowances as determined by the Administration shall be made for the intervals of time required for such water to arrive at the points of diversion in Colorado and at the Stateline.

(5) There shall be no allowance or accumulation of credits or debits for or against either State.

(6) Storage, releases from storage and releases of river flow authorized in this Article shall be accomplished pursuant to procedures prescribed by the Administration under the provisions of Article VIII.

F. In the event the Administration finds that within a period of fourteen (14) days the water in the conservation pool will be or is liable to be exhausted, the Administration shall forthwith notify the State Engineer of Colorado, or his duly authorized representative, that commencing upon a day certain within said fourteen (14) day period, unless a change of conditions justifies cancellation or modification of such notice, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which their respective priority rights were administered by Colorado before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed. Such priority administration by Colorado shall be continued until the Administration finds that water is again available in the conservation pool for release as provided in this Compact, and timely notice of such finding shall be given by the Administration to the State Engineer of Colorado or his duly authorized representative: Provided, that except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this Compact, when there is water in the conservation pool the water users upstream from John Martin Reservoir shall not be affected by the decrees to the ditches in Colorado Water District 67. Except when administration in Colorado is on a priority basis the water diversions in Colorado Water District 67 shall be administered by Colorado in accordance with distribution agreements made

from time to time between the water users in such District and filed with the Administration and with the State Engineer of Colorado or, in the absence of such agreement, upon the basis of the respective priority decrees, as against each other, in said District.

G. During periods when Colorado reverts to administration of decreed priorities, Kansas shall not be entitled to any portion of the river flow entering John Martin Reservoir. Waters of the Arkansas River originating in Colorado which may flow across the Stateline during such periods are hereby apportioned to Kansas.

H. If the usable quantity and availability for use of the waters of the Arkansas River to water users in Colorado Water District 67 and Kansas will be thereby materially depleted or adversely affected, (1) priority rights now decreed to the ditches of Colorado Water District 67 shall not hereafter be transferred to other water districts in Colorado or to points of diversion or places of use upstream from John Martin Dam; and (2) the ditch diversion rights from the Arkansas River in Colorado Water District 67, and of Kansas ditches between the Stateline and Garden City shall not hereafter be increased beyond the total present rights of said ditches, without the Administration, in either case (1) or (2), making findings of fact that no such depletion or adverse effect will result from such proposed transfer or increase. Notice of legal proceedings for any such proposed transfer or increase shall be given to the Administration in the manner and within the time provided by the laws of Colorado or Kansas in such cases.

ARTICLE VI

A. (1) Nothing in this Compact shall be construed as impairing the jurisdiction of Kansas over the waters of the Arkansas River that originate in Kansas and over the waters that flow from Colorado across the Stateline into Kansas.

(2) Except as otherwise provided, nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas River in said State as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River.

B. Inasmuch as the Frontier Canal diverts waters of the Arkansas River in Colorado west of the Stateline for irrigation uses in Kansas only, Colorado concedes to Kansas and Kansas hereby assumes exclusive administrative control over the operation of the Frontier Canal and its headworks for such purposes, to the same extent as though said works were located entirely within the State of Kansas. Water carried across the Stateline in the Frontier Canal or another similarly situated canal shall be considered to be part of the Stateline flow.

ARTICLE VII

A. Each State shall be subject to the terms of this Compact. Where the name of the State or the term "State" is used in this Compact these shall be construed to

include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas River under the authority of that State.

B. This Compact establishes no general principle or precedent with respect to any other interstate stream.

C. Wherever any State or Federal official or agency is referred to in this Compact such reference shall apply to the comparable official or agency succeeding to their duties and functions.

ARTICLE VIII

A. To administer the provisions of this Compact there is hereby created an interstate agency to be known as the Arkansas River Compact Administration herein designated as "The Administration."

B. The Administration shall have power to:

(1) Adopt, amend and revoke by-laws, rules and regulations consistent with the provisions of this Compact;

(2) Prescribe procedures for the administration of this Compact: Provided, that where such procedures involve the operations of John Martin Reservoir Project they shall be subject to the approval of the District Engineer in charge of said Project;

(3) Perform all functions required to implement this Compact and to do all things necessary, proper or convenient in the performance of its duties.

C. The membership of the Administration shall consist of three representatives from each State who shall be appointed by the respective Governors for a term not to exceed four years. One Colorado representative shall be a resident of and water right owner in Water Districts 14 or 17, one Colorado representative shall be a resident of and water right owner in Water District 67, and one Colorado representative shall be the Director of the Colorado Water Conservation Board. Two Kansas representatives shall be residents of and water right owners in the counties of Finney, Kearny or Hamilton, and one Kansas representative shall be the chief State official charged with the administration of water rights in Kansas. The President of the United States is hereby requested to designate a representative of the United States, and if a representative is so designated he shall be an ex-officio member and act as chairman of the Administration without vote.

D. The State representatives shall be appointed by the respective Governors within thirty days after the effective date of this Compact. The Administration shall meet and organize within sixty days after such effective date. A quorum for any meeting shall consist of four members of the Administration: Provided, that at least two members are present from each State. Each State shall have but one vote in the Administration and every decision, authorization or other action shall require unanimous vote. In case of a divided vote on any matter within the purview of the Administration, the Administration may, by subsequent unanimous vote, refer the matter for arbitration to the Representative of the United States or other arbitrator or arbitrators, in which event

the decision made by such arbitrator or arbitrators shall be binding upon the Administration.

E. (1) The salaries, if any, and the personal expenses of each member shall be paid by the government which he represents. All other expenses incident to the administration of this Compact which are not paid by the United States shall be borne by the States on the basis of 60 per cent by Colorado and 40 per cent by Kansas.

(2) In each even numbered year the Administration shall adopt and transmit to the Governor of each State its budget covering anticipated expenses for the forthcoming biennium and the amount thereof payable by each State. Each State shall appropriate and pay the amount due by it to the Administration.

(3) The Administration shall keep accurate accounts of all receipts and disbursements and shall include a statement thereof, together with a certificate of audit by a certified public accountant, in its annual report. Each State shall have the right to make an examination and audit of the accounts of the Administration at any time.

F. Each State shall provide such available facilities, equipment and other assistance as the Administration may need to carry out its duties. To supplement such available assistance the Administration may employ engineering, legal, clerical, and other aid as in its judgment may be necessary for the performance of its functions. Such employees shall be paid by and be responsible to the Administration, and shall not be considered to be employees of either State.

G. (1) The Administration shall cooperate with the chief official of each State charged with the administration of water rights and with Federal agencies in the systematic determination and correlation of the facts as to the flow and diversion of the waters of the Arkansas River and as to the operation and siltation of John Martin Reservoir and other related structures. The Administration shall cooperate in the procurement, interchange, compilation and publication of all factual data bearing upon the administration of this Compact without, in general, duplicating measurements, observations or publications made by State or Federal agencies. State officials shall furnish pertinent factual data to the Administration upon its request. The Administration shall, with the collaboration of the appropriate Federal and State agencies, determine as may be necessary from time to time, the location of gaging stations required for the proper administration of this Compact and shall designate the official records of such stations for its official use.

(2) The Director, U.S. Geological Survey, the Commissioner of Reclamation and the Chief of Engineers, U.S. Army, are hereby requested to collaborate with the Administration and with appropriate State officials in the systematic determination and correlation of data referred to in paragraph G (1) of this Article and in the execution of other duties of such officials which may be necessary for the proper administration of this Compact.

(3) If deemed necessary for the administration of this Compact, the Administration may require the installation and maintenance, at the expense of water users, of measuring devices of approved type in any ditch or groups of ditches diverting water from the Arkansas

River in Colorado or Kansas. The chief official of each State charged with the administration of water rights shall supervise the execution of the Administration's requirements for such installations.

H. Violation of any of the provisions of this Compact or other actions prejudicial thereto which come to the attention of the Administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the Administration may report its findings and recommendations to the State official who is charged with the administration of water rights for appropriate action, it being the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights.

I. Findings of fact made by the Administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of the facts found.

J. The Administration shall report annually to the Governors of the States and to the President of the United States as to matters within its purview.

ARTICLE IX

A. This Compact shall become effective when ratified by the Legislature of each State and when consented to by the Congress of the United States by legislation providing substantially, among other things, as follows:

"Nothing contained in this Act or in the Compact herein consented to shall be construed as impairing or

affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such Compact: Provided, that the Chief of Engineers is hereby authorized to operate the conservation features of the John Martin Reservoir Project in a manner conforming to such Compact with such exceptions as he and the Administration created pursuant to the Compact may jointly approve."

B. This Compact shall remain in effect until modified or terminated by unanimous action of the States and in the event of modification or termination all rights then established or recognized by this Compact shall continue unimpaired.

IN WITNESS WHEREOF, The commissioners have signed this Compact in triplicate original, one of which shall be forwarded to the Secretary of State of the United States of America and one of which shall be forwarded to the Governor of each signatory State.

Done in the City and County of Denver, in the state of Colorado, on the fourteenth day of December, in the Year of our Lord One Thousand Nine Hundred and Forty-eight.

Henry C. Vidal
Gail L. Ireland
Harry B. Mendenhall
Commissioners for Colorado

George S. Knapp
Edward F. Arn
William E. Leavitt
Roland H. Tate
Commissioners for Kansas

Attest:
Warden L. Noe
Secretary

Approved:
Hans Kramer
Representative of the United States

APPENDIX G

RESOLUTION
CONCERNING
AN OPERATING PLAN FOR
JOHN MARTIN RESERVOIR

WHEREAS, the Arkansas River Compact Administration, hereinafter referred to as the Administration, recognizes that, because of changes in the regime of the Arkansas River, the present operation of the conservation features of John Martin Reservoir does not result in the most efficient utilization possible of the water under its control;

WHEREAS, the Administration finds that adoption of an operating plan that establishes storage accounts for Kansas, for the ditches of Colorado Water District 67, and for other Colorado ditches as provided herein may result in more efficient utilization of the water under its control; and

WHEREAS, the Administration finds that provisions of the operating plan contained herein are permitted by and in compliance with the Arkansas River Compact, hereinafter referred to as the Compact; and the Rules and Regulations; and the Bylaws adopted by the Administration;

NOW THEREFORE, BE IT RESOLVED that the Administration approves and adopts the following operating plan:

I. Definitions:

A. "Period of winter storage" consists of the period of time commencing on November 1 of each year

and continuing to the first exhaustion of conservation storage during the compact year.

B. "Summer storage season" shall be the period of time commencing at the first exhaustion of conservation storage and continuing to and including the next succeeding October 31.

C. "Inflows" include all the normal accretions into John Martin Reservoir, measured or otherwise, including river flow but not including deliveries into the permanent pool or deliveries of other water as subsequently defined herein.

D. "Conservation storage" is water stored in the conservation pool that, but for the adoption of this resolution, would have comprised of the benefits arising from the construction of John Martin Reservoir.

E. "Other water" for regulation by John Martin Reservoir is water delivered into the accounts established in Section III, herein, and delivered under the authority of pre-Compact Colorado water rights. Deliveries of other water are permitted to gain increased utilization and greater beneficial use.

F. "Compact year" is the water accounting year of the Administration; it commences on November 1 of each year and extends to and includes the next succeeding October 31.

G. Except as provided herein, all words and terms used in this resolution have the meaning prescribed in Compact Article III.

II. Operating Principles:

A. Period of Winter Storage –

All inflows into John Martin Reservoir during a period of winter storage shall accrue to conservation storage. Conservation storage shall be released into the accounts specified in Subsection II D beginning at the first request for release after March 31 of account water by a Colorado Water District 67 ditch or by Kansas or beginning at 8:00 a.m. on April 7, whichever occurs first.

B. Summer Storage Season –

(1) When a runoff event occurs during the summer storage season, such that inflows into John Martin Reservoir are expected to exceed then existing irrigation requirements of the ditches in Colorado Water District 67 by at least 1,000 acre-feet, then the gates on John Martin Reservoir shall be closed commencing conservation storage except for releases of account water pursuant to Subsection II E, herein.

(2) The ditches in Colorado Water District 67 will be removed from the Colorado priority system when the sum of the flows of the Arkansas River at the Las Animas gaging station and the Purgatoire River at the Las Animas gaging station, exclusive of separate deliveries of other water under Section III, herein, indicates that conservation storage will occur.

(3) All inflows entering said reservoir during a period of conservation storage in the summer storage season shall accrue to conservation storage. Conservation storage shall be

released into the accounts specified in Section II D beginning at the first request for release of account water by a Colorado Water District 67 ditch or by Kansas or beginning 48 hours after commencement of conservation storage, whichever occurs first.

C. Exhaustion of Conservation Storage –

(1) For the purposes of Compact Article V F, the conservation pool shall be deemed exhausted whenever conservation storage has been completely released into the accounts. When this occurs, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which their respective priority rights were administered before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed. However, during these times, inflows shall, to the extent practical, be measured and released from the reservoir without temporary storage or averaging flows, and conservation storage may not be accumulated nor may storage in the accounts be increased except by deliveries of other water under Section III, herein.

(2) Administration in Colorado under decreed priorities shall be initiated so that ditches upstream from John Martin Reservoir shall deliver to the priorities of Colorado Water District 67 ditches water at the Arkansas

River at the Las Animas gaging station coincident with the exhaustion of the conservation storage when taking the flow of all waters, including that of the Purgatoire River, into appropriate consideration.

D. Release into the Accounts –

(1) When conservation storage is being released into the accounts according to the provisions of Subsections II A or II B, herein, it shall be released at the total rate of 1,000 cfs. However, when conservation storage exceeds 20,000 acre-feet, it shall be released at the total rate of 1,250 cfs.

(2) Releases of conservation storage shall be into accounts and said releases shall be apportioned 60 percent for the accounts of the Colorado Water District 67 ditches and 40 percent for the Kansas account.

(3) The releases for the Colorado Water District 67 ditches shall be distributed into individual accounts according to the following percentages:

Fort Bent	9.90 percent
Keesee	2.30 percent
Amity	49.50 percent
Lamar	19.80 percent
Hyde	1.30 percent
Manvel	2.40 percent
X-Y & Graham	5.10 percent
Buffalo	8.50 percent
Sisson – Stubbs	1.20 percent

E. Releases Out of Accounts –

(1) Kansas and the various Colorado ditches may demand the release of water contained

in their respective accounts, including those established in Section III herein, at any time at whatever rates they desire.

(2) Releases of water from the accounts, including those established in Section III herein, may be made simultaneously with releases from conservation storage into the accounts. However, such simultaneous releases cannot create deficits in those accounts.

(3) All such releases of account water from John Martin Reservoir to Colorado water users are subject to transit losses between John Martin Dam and the point of diversion from the Arkansas River, as determined by the Colorado Division Engineer, and the transit losses shall be borne by such releases.

(4) Releases of Kansas account water shall be measured at the Stateline as provided in Compact Article V E (3) allowing appropriate arrival times. If transit losses occur, those losses shall be determined by the Colorado Division Engineer and a representative of the Kansas Division of Water Resources and shall be replenished from the Kansas transit loss account. In the event that such losses at the end of the delivery are greater than the total in the Kansas transit loss account, then the deficit shall be made up from the next available transfers of other water under Subsection III D.

(5) The water users and the responsible officials of both Colorado and Kansas shall do their utmost to achieve maximum beneficial use including calling for deliveries of Kansas

account water during reasonable and favorable river conditions. When transit losses are deemed by the Colorado Division Engineer to be excessive, he shall so advise the receiving entity. Conversely, when river conditions are favorable for a delivery to Kansas, he shall so advise the Kansas Water Commissioner.

F. Evaporation charges shall be made against water stored in the accounts, including those established in Section III, herein, and the Kansas transit loss account, using formulas and procedures approved by the Colorado Division Engineer and a representative of the Kansas Division of Water Resources and using, when available, pan evaporation data provided by the Corps of Engineers. The evaporation charges shall be prorated amongst conservation storage and the accounts according to the amounts in them.

G. In the event that runoff conditions occur in the Arkansas River basin upstream from John Martin Reservoir that cause water to spill physically over the project's spillway, then water stored in the permanent pool in excess of 10,000 a.f. shall spill before the accounts granted in Subsection III A, B, and C, which shall spill before the accounts granted in Section II, which shall spill before the Kansas Transit Loss Account, all of which shall spill before the conservation pool water. The amount of spill from the accounts shall be prorated amongst them according to the amounts in them at the beginning of spill. During times of spill, the permanent pool shall occupy flood control space as provided in the Administration's Resolution of August 14, 1976, and Public Law 89-298.

III. Other Water for Regulation by John Martin Reservoir:

A. The Amity may store such water as it could otherwise divert from the Arkansas River for storage in the Great Plains Reservoir system in its account granted in Section II, herein. This water will be in addition to water released into the Amity account under Section II, herein.

B. An account for the Fort Lyon Canal is hereby granted in John Martin Reservoir for agricultural purposes only. The Fort Lyon Canal may deliver water into said account under an approved Pueblo winter storage plan subject to the limitations that total quantity in the account at any time cannot exceed 20, 000 acre-feet and that the delivery cannot include water that otherwise would have accumulated in conservation storage. The Fort Lyon may use water in this account for exchange with existing priorities. However, this account shall not be used in any manner to increase the permanent recreation pool, either by exchange, transfer, change of use, or otherwise. In the event that water accumulated in this account has not been completely released by the end of the compact year, then that water shall become conservation storage controlled by Subsection II A, herein.

C. An account for the Las Animas Consolidated Canal Company is hereby granted in John Martin Reservoir for agricultural purposes only. The Las Animas Consolidated Canal Company may deliver water into said account under an approved Pueblo winter storage plan subject to the limitations that total quantity in the account at any time cannot exceed 5,000 acre-feet and

that the delivery cannot include water that otherwise would have accumulated in conservation storage. The Las Animas Consolidated may use water in this account for exchange with existing priorities. However, this account shall not be used in any manner to increase the permanent recreation pool, either by exchange, transfer, change of use, or otherwise. In the event that water accumulated in this account has not been completely released by the end of the compact year, then that water shall become conservation storage controlled by Subsection II A.

D. Thirty-five percent of all water deliveries to John Martin Reservoir, under Subsections III A, III B, and III C, herein, during any compact year shall be transferred into the accounts for Kansas transit losses, for Kansas, and for Colorado Water District 67 ditches at the time of delivery in the following manner: First, transfers from deliveries shall make up deficits, if any, in the Kansas transit loss account which result from Subsection II E (4), herein, and shall then also fill the said Kansas transit loss account to the amount of 1,700 acre-feet. Then, of all such water delivered in excess of this specified amount, 11 percent of those deliveries shall be transferred to the Kansas account and 24 percent of those deliveries shall be transferred to the account of the Colorado Water District 67 ditches. Transfers into the accounts for Colorado Water District 67 ditches shall be distributed according to the percentages in Subsection II D (3), herein; except the Amity shall not share in distributions of deliveries under Subsection III A, herein.

IV. A permanent recreation pool has been authorized by the August 14, 1976, Resolution of the Administration. For purposes of the Resolution, this permanent recreation pool shall be considered a separate account and deliveries made to it are not subject to the transfers provided in Subsection III D, herein. The permanent recreation pool will, however, stand its pro rata share of evaporation as provided in the Administration's Resolution of August 14, 1976.

V. In the event of injury either to entities in Colorado or to Kansas, there shall be restitution from the first account water thereafter available from the entity receiving improper benefits. The engineering committee shall quantify such injury, subject to the approval of the Administration

VI. Adoption of this resolution does not prejudice the ability of Kansas or of any Colorado ditch to object or to otherwise represent its interest in present or future cases or controversies before the Administration or in a court of competent jurisdiction.

VII. This agreement shall be, and continue to be, in full force and effect from and after the date of execution of this resolution until March 31, 1981, and year to year thereafter subject to the following provisions:

A. Not later than December 1 of each year, the Colorado Division Engineer shall make an accounting of the operation under this resolution for the previous compact year available to the Operations Committee of the Administration and to interested parties. Either Colorado or Kansas, through its compact delegation, may then terminate this resolution on the next succeeding March 31 by giving written notice to the Administration by February 1 of the same compact year.

B. In the event this resolution is so terminated, then entities storing water in accounts prior to such termination may utilize such water during the next irrigation season under the provisions of this resolution. Water not utilized by the following November 1 shall revert to conservation storage.

VIII. This resolution supersedes in its entirety the agreement of December 12, 1978, concerning Amity-Great Plains water and the Resolution concerning an Interim Operating Plan for John Martin Reservoir entered into on March 21, 1980. All water delivered into the accounts established under the authorities of these two resolutions shall be forwarded and credited, without deductions, to the accounts for the same entities that are established in this operating plan.

Entered this 24th day of April, 1980, by special telephonic meeting, and revisions approved on May 10, 1984 and December 11, 1984.

/s/ Frank G. Cooley
Chairman
Arkansas River
Compact
Administration

/s/ James G. Rogers
Secretary
Arkansas River
Compact
Administration

/s/ J. William McDonald
Colorado Member
Arkansas River
Compact
Administration

/s/ David L. Pope
Kansas Member
Arkansas River
Compact
Administration

APPENDIX H

EXCERPTS FROM HEARINGS BEFORE A SUBCOMMITTEE ON IRRIGATION AND RECLAMATION OF THE COMMITTEE ON PUBLIC LANDS, HOUSE OF REPRESENTATIVES, EIGHTY-FIRST CONGRESS (APRIL 30, 1949). . . .

STATEMENT OF GAIL L. IRELAND, MEMBER, WATER CONSERVATION COMMISSION OF COLORADO

Mr. IRELAND. Mr. Chairman and gentlemen of the committee, since the committee appears to be concerned with the significance of this New Mexico situation, I think possibly a graphic way to show you what a relatively small area is affected would be to pass around this map of the watershed, and you will note that there are two darkly shaded areas which are the small areas in New Mexico which in every way possible we did not include in this compact and did not want to include.

I might add that you see two small areas in black, and one to the west is not affected in any event, because that is in the Rio Grande Basin. It is just that one small black area to the east.

Mr. MURDOCK. Thank you. Mr. Ireland, you may proceed.

Mr. IRELAND. I appreciate the valuable time of this committee, and I will only attempt to touch upon certain points upon which there does seem to be particular interest.

First, the inquiry has been made as to whether we know why 5 out of 65 members of the House of Representatives did not see fit to vote for this bill.

The reasons they assigned out loud were, so far as I could determine, not based on clear understanding of the bill. They were not intelligent objections; they indicated fear that this compact or any compact would crystalize and settle and determine rights which maybe 100 years from now someone might regret having so settled. That happens when any compact is entered into.

There were one or two who had certain selfish interests on that river who would much prefer to have had a free river without any limitations on them. I think that is the best explanation of the objections we heard.

We were very careful to see that we did not, in any manner, violate any provisions of the Colorado River compact, and we therefore, do not deal with that water in this compact in any manner. We were careful to see that we did not decide anything as to what might happen to the water in New Mexico. That is why we used the words "if any." It was not up to us to decide that question.

We were very careful to see that this compact did not impede or prevent future beneficial development, if any can be accomplished in that basin; at the same time, being equally certain and definite that the rights which were determined in this compact would not be upset, or endangered by some other future development.

It is very necessary to recognize the position and the operations of the United States Army engineers in this picture. They built the reservoir. It is the responsibility of the Corps of Engineers to maintain that reservoir and to operate the same. And, I am sure General Kramer will

entirely to your satisfaction explain why that last provision was put in that has been called to the attention of this committee.

It has been explained to you gentlement [sic] that we had more or less of a compact within a compact because of the location of this reservoir and dam.

It more or less temporarily upset or changed the relative rights and positions of the water users above the reservoir in Colorado and the water users below the reservoir in Colorado. But this compact also makes it possible now for water users above the reservoir who heretofore were restricted to the use of that water based on priority of right to ignore senior rights below which previously they could not do if they had a junior decree.

Now, when there is water in that reservoir, the direct flow water above the water reservoir is open and free. It has been a great benefit to the water users above the reservoir. By the same token, a controlled storage is a greater benefit to the water users below the reservoir.

Article VIII goes into detail as to how the reservoir will be operated and by whom after the compact has gone into effect. There will be a Federal representative if the President sees fit to appoint one who will act as chairman without vote. Each State has one vote regardless of the number on the commission. The jurisdiction of each State has been fully protected by article VIII.

Another thing we were careful about was to provide that this compact establishes no general principle or precedent with respect to any other interstate stream.

I feel that we have adequately protected the rights and sovereignty of the United States in article IX because that provision was not only satisfactory to the members of the commissions of the two States, but to all Federal agencies.

I believe, if it please the committee, that that is all I have to say, other than to add to Mr. Stone's remarks this statement: The help of General Kramer in working with us in resolving our differences was very unusual and very fine. We deeply appreciate the assistance he gave us.

Thank you.

* * *

APPENDIX I

EXCERPTS FROM HEARING BEFORE THE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, UNITED STATES SENATE, EIGHTY-FIRST CONGRESS (APRIL 29, 1949)

STATEMENT OF GAIL L. IRELAND, MEMBER, COLORADO COMMISSION ON THE ARKANSAS RIVER COMPACT

Mr. IRELAND. Mr. Chairman, and gentlemen of the committee, my name is Gail L. Ireland, attorney, practicing in Denver. I have been a member of the Colorado Commission since the inception of negotiations.

Mr. Vidal has covered this so much in detail that I, having respect for the valuable time of you gentlemen, will just touch on a few points that might be helpful in understanding the compact.

First, we were very careful to respect the Colorado River Compact to the end that we would not in any manner in this compact deal with any imported water that might come in to the Arkansas River Basin from the Colorado River. We also were careful not to deal with any water that might come into the Colorado from New Mexico, a small tributary. The volume of water is small, but there is some. That is not recognized in this compact.

I am sure you gentlemen will remember the case of *Colorado v. Kansas,* which was decided just a few years ago, in which we had a very definite admonition from the Supreme Court of the United States to terminate some 40 years of litigation and bad feeling and ineffective use of the waters of that river by means of compact. We started in in all sincerity to work it out on that basis.

We have also been very careful in this compact to so prepare the same that it would not in any manner prevent proper future development, whatever may be able to be accomplished in the future, on the river. We know that the Bureau of Reclamation has plans, and this compact, in my opinion, does not stand in the way of any of those plans.

It has been mentioned here that the division was roughly 60 percent to Colorado and 40 percent to Kansas. That is true when qualified with the statement that that is based on rate of flow and not necessarily volume of water in the reservoir. That was done purposely in order to provide the greatest flexibility and the most economic and timely use of this water for both States.

The result of this compact might well be that Kansas over a given period might withdraw far more than her so-called 40 percent, if the needs and conditions require it; depending on local rains, flash floods that may appear at different places along the river. And, by the same token, Colorado might at certain periods benefit to an extent of more than 60 percent, based on rate of flow. But that was thoroughly understood by all commissioners, and was done purposely in order to provide the water users with the very best possible use of this water at all times.

Particular care was given – and we had the help and real assistance of General Kramer at all times – in seeing to it that provisions were put in this compact that would be welcomed by the Federal agencies and not cause any disagreement or any feeling on the part of any Federal

agencies that these two States were not willing to recognize the rights of the United States. I refer particularly to article IX of the compact. Also, in setting up the administrative organization which will handle this matter, if and when the compact goes into effect, by providing that the chairman of that agency shall be a Federal representative, if the President of the United States sees fit to appoint one, although that chairman does not have a vote.

Also, we have fully recognized, I believe, the rights of the United States Army engineers, bearing in mind the responsibility of that agency in the maintenance and operation of this reservoir as a flood-control unit.

Mr. Vidal emphasized the fact that we had a great deal of difficulty in our own State because of the fact this reservoir was so located that it radically changed the position in many ways of users above the reservoir and below the reservoir. We feel that we have equitably ironed that out by providing that when there is water in the reservoir the users above the reservoir, who up to this time have had to operate strictly according to decrees and according to priorities, may have the advantage of disregarding senior rights below, because those users below, having the senior rights, now have the benefit of a controlled storage, which is much more efficient and valuable.

As has been mentioned, if at any time the reservoir becomes empty, the entire river in Colorado reverts back to the administrative decree system. There is a provision in the compact which assists in the operation of making those changes back and forth when those conditions take place.

Personally, I would like to say that knowing the long history of litigation and real bad feeling that existed for years between Colorado and Kansas over this water, that we, who are on the Commission, feel that we have accomplished a great deal in being able to iron out these troubles and to look at things without prejudice. I want to compliment at this time the commissioners from Kansas on the fair, friendly attitude that they took, in spite of some of their water users who probably felt they were too liberal minded. By the same token I know that some of our users felt that possibly we were too liberal in some things. But those are the things that you have to do when you give and take in making a compact.

We feel we made the best compact that can be made, and that it will end up in a great improvement in the operation of this river in both states.

The CHAIRMAN. This provision by which you have suspended the operation of priorities so that the stored waters may be used to the maximum, as I get it, is a new principle, is not?

Mr. IRELAND. It is, and it is based upon contract among the water users, because it is not in conformity with our State law. It has been for several years now operated under agreement between the water users and the compact specifically provides for continuation of such agreement.

The CHAIRMAN. So long as there is water in the reservoir that may be released, which protects the demand below the reservoir, nobody below the reservoir is injured?

Mr. IRELAND. Correct.

The CHAIRMAN. But if the water supply in the reservoir should run low and these old priorities could not be served, then the other system is revived?

Mr. IRELAND. That is correct.

The CHAIRMAN. Is there any other provision in the compact which is different from the traditional method of handling water?

Mr. IRELAND. I believe not, Mr. Chairman. I think that constitutes the only radical departure from what has generally been accepted in previous compacts and what is a part of the respective laws of the two States.

The CHAIRMAN. So that aside from that the compact is merely a division of the waters between the two States?

Mr. IRELAND. That is right.

General KRAMER. May I prompt Mr. Ireland to mention, if I may, Mr. Chairman, the provision that the compact does not provide any bookkeeping, any keeping of records of credits or debts between the two States. I think that is a rather unique feature in an interstate water compact. Mr. Ireland, I am sure, can develop that point, and it may be of interest to the committee.

Senator KERR. Doesn't the compact contain express provision that there shall be no making up of debits or accumulation of credits?

Mr. IRELAND. It does so provide.

Senator KERR. Isn't that in there in specific form?

Mr. IRELAND. In so many words.

I might say this, which I had intended to say: We had the advantage of approximately 3 years of operating under so-called interim executive agreements entered into between the two States. That provided us a reasonably long period of experimentation. At first we tried this system of trying to keep books. We found it was practically impossible. No two people could just exactly agree on how much water they were talking about from time to time. We saw that it was not a practical way to handle the situation and in the interest of giving the users of both States the most opportune use, the most effective and efficient use, we finally arrived at this understanding of an approximate 60-40 withdrawal in rate of flow from the reservoir, with the specific provision in the compact that at the end of each season, or at any given time, there would be no books kept and there would be no carryover one way or another.

We believe that the water users and the administrative officials of both States, with the assistance of a reasonable-minded administrative agency, will so handle the discharge of that water and the application of that water for beneficial use that both Sates [sic] will benefit equitably and without too much hindrance. That in some ways is an innovation and something new in compacts, not keeping books.

The CHAIRMAN. Are there any other questions?

(No response.)

The CHAIRMAN. That you very much, Mr. Ireland.

* * *

APPENDIX J

EXCERPTS FROM PLAN FOR OPERATION OF CADDOA PROJECT AND ADMINISTRATION OF RIGHTS IN ARKANSAS RIVER (FEBRUARY 1944) .....

* * *

8. Upstream Benefits.

Prior to Caddoa, at times when substantial inflows to the river via tributaries, such as the Purgatoire River, satisfied the needs of lands and crops under ditches downstream from Caddoa in Water District 67, the priority rights of said ditches were considered to be satisfied or ineffective, and could not be exercised to claim another or a second supply of water away from junior priorities of ditches upstream. Under such conditions the ditches upstream were authorized, under State laws, and in accordance with their respective decreed but unsatisfied priority rights, to divert from the river all the stream flows available for diversion by them, allowing none to flow down to Water District 67 except such flows as were undivertible and unusable upstream.

This long-established system of water right administration, under the laws of Colorado, will prevail after Caddoa, at all times when the priority rights of ditches in Water District 67 are similarly satisfied by supplies of water impounded in the irrigation pool. By thus shifting the burden of supplying the rights and needs of ditches in Water District 67 from the junior priorities of upstream ditches to the irrigation pool, the ditches upstream are enabled to make additional diversions, and in that way

some of the conservation benefits of the Caddoa project will be reflected into upstream areas, as intended, and be apportioned among upstream appropriators.

Manifestly, at times when the irrigation pool is empty, no conservation benefits will accrue upstream, since the priority rights of ditches in Water District 67, being unsatisfied, will be asserted against those upstream, under such conditions, in the future the same as in the past.

Even when water is impounded in the irrigation pool there will be times when conservation benefits cannot be reflected upstream, as for example: (a) during all those usually prevailing low-flow conditions when only the most senior priorities along the river can be supplied, no increased diversions can be made upstream for the reason that, since the effective senior rights in District 67 were satisfied by local return flows, and no supplies were allowed to pass out of District 17 prior to Caddoa, no greater diversions can be made upstream under the same conditions in the future; (b) at times when large stream flows satisfied the rights and supplied the needs and diversion capacities of all ditches along the river, no greater diversions by upstream ditches can be made after Caddoa than before; (c) at times when the needs of lands and ditches in Water District 67 were satisfied by local rainfall or tributary inflow, the upstream ditches diverted all flows available to them prior to Caddoa, and hereafter can make no greater diversions, under the same conditions in the future; and (d) during winter months when irrigation needs are small or absent, and such as exist in Water District 67 are largely supplied by return flows, the upstream ditches have heretofore diverted, for irrigation

and storage purposes, substantially all the stream flows available in upstream districts, and cannot therefore materially increase their diversions during winter months in the future, regardless of the status of storage in the irrigation pool under the conditions and at the times above mentioned.

* * *

APPENDIX K

EXCERPTS FROM STATEMENT RE: INTERSTATE RELATIONS UNDER PLAN OF OPERATION OF CADDOA RESERVOIR AND ADMINISTRATION OF RIGHTS IN ARKANSAS RIVER

FOREWORD

The plan of operation and administration hereinafter defined was adopted by the water users and officials of Colorado on a trial basis, and for a test period beginning April 1, 1944, upon the understanding that any details which prove unworkable or inequitable, or concerning which disputes arise, may be reviewed and revised after proper hearings thereon.

The said plan provides, among other things, for; (1) operation of the irrigation pool in Caddoa Reservoir in accordance with the public nature and authorized purposes of the John Martin (Caddoa) Reservoir Project, as hereinafter more fully described; (2) administration of the rights of appropriators along the Arkansas River in Colorado whose operations and relations with each other are affected by operations of Caddoa Reservoir; (3) the maintenance of pre-Caddoa relations between the two States, with respect to usable water supplies of the Arkansas River, under the Opinion of the United States Supreme Court entered December 6, 1943 in the case of Colorado and Kansas; (4) a proportionate division between the water users of the two States of such additional supplies as may become available for increased use through operations of Caddoa Reservoir; and (5) the prevention, so far as possible, of future local and interstate disputes and litigation.

The said plan recognizes that Caddoa Reservoir will change the streamflow conditions downstream, and, by changing the pre-Caddoa diversion opportunities and relations both above and below Caddoa, in the absence of such a plan, may benefit one ditch, or one group of water users, or one State, at the expense or to the injury of another, and may thus become the source of continuing controversy and of possible litigation between (a) the individual appropriators downstream in Water District 67 in Colorado; (b) that group and others in Colorado upstream in Water Districts 14 and 17; and (c) the water users of the two States. It recognizes also that interstate relations will in part be determined by the manner in which Caddoa Reservoir is operated and the Colorado water rights are administered; and that the problems of reservoir operation and water-right administration are interdependent and inseparable. For these reasons the statement concerning interstate relations is preceded by an explanatory statement regarding the Caddoa project, the Colorado system of water right administration, and related matters.

EXPLANATORY STATEMENT

1. The Caddoa Project, located on the Arkansas River in Colorado about 58 miles upstream by river from the Stateline between Colorado and Kansas, was authorized by Congress for construction by the United States, War Department, Corps of Engineers, as a dual-purpose project, to provide for: (1) flood control, and (2) irrigation, along the Arkansas River in Colorado and Kansas. It is a public improvement concerning which there are no

repayment obligations, either for flood control or irrigation, on the part of local beneficiaries in either State, and in which there can be no private rights. Subsequent to authorization its official name was changed to the "John Martin Reservoir Project", which includes Caddoa dam and reservoir.

2. Tributary to the stretch of river between Caddoa and the Stateline there are 6,448 square miles of catchment or drainage area, which is about one-fourth of the total area drained by the Arkansas River and its tributaries in Colorado. Adjoining said channel about 120,000 acres of land are commonly irrigated, about half by diversions from the river above Caddoa, and half by diversions in Water District 67 downstream. Tributary runoff and return flows entering the river below Caddoa cannot be controlled, regulated or conserved by the Caddoa project. And, since a large share of such contributions and accretions below Caddoa enter the river below Lamar, and hence below the diversion works of the major canals in Water District 67, they are subject to only minor depletions in Colorado, and constitute a supply of water available to Kansas that is largely unavailable to Colorado.

3. To provide for the authorized dual-purposes of (1) flood control and (2) irrigation, the storage space in Caddoa Reservoir as Caddoa dam is now constructed, and as it may later be enlarged by the installation of flood-control gates at the crest of the constructed concrete spillway, is segregated into an upper flood-pool and a lower irrigation pool.

(1) The flood-pool will function only at times of major floods after the irrigation pool is filled, and will be

operated by or under the direction of the Corps of Engineers, to reduce damages from floods originating above Caddoa to lands and property along and adjoining the river channel downstream in Colorado and Kansas. Average annual flood control benefits to the owners of such lands and property will accrue in the proportions: 27% to Colorado and 73% to Kansas (H. D. 308, 74th Congress, 1st Session; Vol. I, Table 53, page 498). Note: The plan of operation and administration herein defined relates solely to the irrigation pool, and will not interfere with operations of the flood pool by or under the direction of the Corps of Engineers.

(2) The irrigation pool is dedicated to irrigation uses, to be operated for the purposes of (a) streamflow regulation and (b) water conservation, for the benefit of water users and irrigation interests along the Arkansas River downstream in Colorado and Kansas and upstream in Colorado.

4. Regulation of streamflow involves previously used or appropriated water supplies, and creates benefits by impounding the flows which formerly were diverted downstream, when and as available from the unregulated river, and later releasing the impounded waters more nearly when and as needed by lands and crops. Such regulation benefits will necessarily accrue most largely to those ditches nearest Caddoa whose diverted supplies are most largely subject to regulation by Caddoa Reservoir. However, some regulation benefits will also accrue to ditches further downstream in Colorado and Kansas. But because their diversions include larger proportions, and at times consist wholly, of tributary inflows, return flows and accretions to the river below Caddoa, such benefits

necessarily diminish with increased distances downstream from the Caddoa project.

5. Water conservation involves previously unused or unappropriated streamflows, and creates benefits by impounding flood waters and winter flows which, except for storage in Caddoa Reservoir, would be undivertible, unusable and wasted, and by releasing such impounded waters for additional diversion and increased use. As distinguished from flood-control benefits, which will accrue only downstream and more largely to Kansas, and as distinguished from regulation benefits, which also will accrue only downstream but more largely to Colorado, the benefits of water conservation are subject within limits to arbitrary allocation between the two States, and in Colorado, again within limits, between water users above and below Caddoa.

6. At times in the past when inflows to the river via tributaries, such as the Purgatoire River, were sufficient to satisfy then effective priority rights in Water District 67, they could not be exercised to claim another or second supply away from junior priorities of ditches in upstream districts. Instead, under such conditions, the upstream ditches were authorized, in accordance with their respective unsatisfied priority rights, to divert all the streamflows available to them, allowing none to pass downstream to Water District 67. This long-established system of water-right administration, under the Constitution and laws of Colorado, has not been altered by the construction of the Caddoa project. It will continue to prevail at all times when the priority rights of ditches in Water District 67 are similarly satisfied by supplies of water impounded in Caddoa Reservoir. In that way some

of the conservation benefits of Caddoa Reservoir will be reflected, as intended by the design and authorization of the project, into areas upstream therefrom, and be apportioned in accordance with rights established under State laws among the upstream appropriators.

* * *

APPENDIX L
(Excerpted)

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Plaintiff, v. STATE OF COLORADO, Defendant.	)	No. 105, Original October Term, 1985

REPORT OF SPECIAL MASTER
RE WINTER STORAGE MOTIONS

Colorado has filed several motions concerning the so-called winter storage program. These consist of a Motion for Partial Summary Judgment on the 1951 Resolution, a Motion to Stay Review of Kansas' Claim of Injury from the Winter Storage Program, and Motions to Strike Portions of the Affidavits of Douglas R. Littlefield, Ph.D. and Carl E. Bentrup filed on behalf of Kansas. In support of these motions, Colorado has submitted several affidavits and four large volumes of accompanying documents. Many date back to the events leading up to the adoption of the Arkansas River Compact in 1949. The United States, now having intervened in this case, also filed a brief in support of Colorado's Motion for Partial Summary Judgment. Kansas, in reply, filed three volumes of additional documents, together with the Littlefield and Bentrup Affidavits. All parties agreed that these motions could be decided by the Special Master without oral argument.

Colorado's Motion for Partial Summary Judgment

In its Complaint Kansas contends, among other allegations, that any reregulation of the native waters of the Arkansas River must be approved by the Compact Administration, pursuant to a Resolution adopted by the Compact Administration on July 24, 1951 (hereinafter the "1951 Resolution"). Colorado seeks a determination through its Motion for Partial Summary Judgment that such approval by the Compact Administration is not legally required.

The issues arise out of the winter storage program in Pueblo Reservoir, a part of the Fryingpan-Arkansas Project authorized by Congress in 1962. 43 U.S.C. §§ 616-616f (1962). Pueblo Dam is located on the mainstem of the Arkansas River approximately six miles west of the City of Pueblo, Colorado, and is owned and operated by the United States, through the Bureau of Reclamation. The Fryingpan-Arkansas Project brings water from the Colorado River Basin west of the Continental Divide into the Arkansas River Valley of Eastern Colorado, storing such water in Pueblo Reservoir. In addition, Pueblo Reservoir provides storage space for the reregulation of private water rights. This reregulation involves the storage of "native" waters of the Arkansas River which were historically diverted by water users in Colorado for irrigation use during the winter months, but which now are stored for later release during the months of peak crop demand (hereinafter the "winter storage program").

The 1951 Resolution consisted of certain "comments and recommendations" made by the Compact Administration to the Governors of Colorado and Kansas with

respect to the then proposed Fryingpan-Arkansas Project.[1] The Resolution sets out the Compact Administration's understanding of the proposed project, namely, that approximately 70,000 acre-feet of water a year would be imported from the Colorado River Basin into the Arkansas River Basin for supplemental irrigation and domestic water supplies in Colorado; and further, that the project would involve the reregulation of native waters of the Arkansas River. Noting its concern over the reregulation of native waters, the Compact Administration recommended to the Governors of Colorado and Kansas, "and expressed as a policy of the Arkansas River Compact Administration," that the proposed Federal project be approved, but on the condition that there would be no reregulation of native waters of the Arkansas River until a plan therefor had been submitted to, "and approved by," the Arkansas River Compact Administration and the affected water users. The full text of the 1951 Resolution is attached to this Report.

Colorado's argument on its Motion for Partial Summary Judgment begins with an analysis of the Arkansas River Compact, and the powers granted therein to the Compact Administration. The Compact was approved by Congress in 1949, and is now a law of the United States. 63 Stat. 145 (1949); *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981). The

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[1] At that time the project was known as the "Gunnison-Arkansas Project, Roaring Fork Diversion." The Gunnison-Arkansas Project was ultimately scaled down, and the Roaring Fork Diversion Unit was renamed the Fryingpan-Arkansas Project, and authorized for construction in 1962.

Compact Administration can exercise only those powers provided in the Compact ratified by Kansas and Colorado, and approved by Congress under the Compact Clause of the United States Constitution. The Compact Administration cannot, by its own action, expand its powers; nor can a court order relief inconsistent with the express terms of the Compact. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

* * *

Kansas properly points out that this provision deals only with a "violation" of the Compact, and it is the position of Kansas that the Administration has the right of approval in order to *prevent* Compact violations. Nonetheless, Article VIII-H, coupled with the requirement that any action by the Compact Administration be approved by the representatives of both States, underscores the limited direct enforcement powers of the Compact Administration.[2]

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[2] The history of the Compact negotiations shows a successive weakening of the powers originally proposed for the Compact Administration. For example, early proposals would have made Administration findings of fact conclusive in subsequent court proceedings, and would also have allowed the Administration to institute appropriate legal action in the event the States failed to act. Record, Colorado-Kansas Arkansas River Compact Commission at 15-25; 15-46-47. Both of these powers were finally dropped. Record, *id.* at 15-58; 17-83-84. Kansas says that Article VIII was "gutted" of any real enforcement provisions. Kansas' Response to Colorado's Motion for Partial Summary Judgment at 22.

* * *

The Special Master has studied the voluminous record of the Compact negotiations submitted by both States, and concludes that the record does not support Kansas' claim that the Compact negotiators intended to vest the Compact Administration with ". . . the authority to approve or disapprove any future federal development that might undermine the status quo as established by the Compact." Kansas' Response at 34. Indeed, specific reference to a right of "approval" does not appear anywhere in the historical record.[3] Although Kansas claims that such authority may be "implied" (*id.* at 30), nothing in the record supports a conclusion that the Compact Administration was intended to have greater authority than is evident from the Compact itself. The powers of the Compact Administration were carefully circumscribed.

* * *

The fundamental question here involves the powers of the Compact Administration. That is a question of the statutory interpretation of the Arkansas River Compact and the Federal legislation authorizing the Fryingpan-Arkansas Project. Volumes of documentary history have been submitted to aid in such interpretation. While the conclusions to be drawn from this record are certainly at issue, there do not appear to be material issues of fact.

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[3] It is interesting that the affidavit of Douglas R. Littlefield, Ph.D., the historian retained by Kansas, speaks only of the right to "review and comment" on plans for the reregulation of native waters of the Arkansas River, and not the right of approval which Kansas claims was intended by the Compact negotiators. Kansas' Response at 2.

Matters of statutory interpretation and application present issues of law, not fact, and in the final analysis, it is ". . . the province and duty of the judicial department to say what the law is." *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (quoting *Marbury v. Madison*, 5 U.S. 137 (1 Cranch) (1801)); *see also Fed. Election Comm'n. v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981); *State of Cal. ex rel. State Water Resources Control Bd. v. Federal Energy Regulatory Comm.*, 877 F.2d 743, 745-46 (9th Cir. 1989). Particularly is this true with respect to interstate compacts. In *Texas v. New Mexico*, 462 U.S. 554 (1983), for example, the Supreme Court recognized that:

> "If there is a compact, it is a law of the United States . . . and our first and last order of business is interpreting the compact." 462 U.S. at 567-568.

* * *

Accordingly, the Special Master recommends that the Colorado Motion for Partial Summary Judgment on the 1951 Resolution be granted.

* * *

Kansas argues that the 1951 Resolution was not a legislative enactment, but rather a "bilateral agreement between two parties" that should be analyzed under contract law. Kansas' Response at 3. It is not clear that applying contract law would save either of these affidavits, but the Special Master does not agree that the 1951 Resolution represents such an agreement. It was simply a resolution adopted by the Arkansas River Compact Administration, an interstate agency, which set forth its findings of fact, comments, and recommendations to the

Governors of Kansas and Colorado on the Feasibility Report for the Fryingpan-Arkansas Project. It was a policy statement by an administrative agency, not an agreement between the States of Kansas and Colorado. The Compact Administration is "a body outside the State" which has been granted, by the Compact, a "reasonable and carefully limited delegation of power." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30-31 (1951). There is no question about what the 1951 Resolution states. However, the legal right of approval over the reregulation of native waters of the Arkansas River cannot come from the Resolution. Any such authority must derive from the Compact or the authorizing legislation for the Fryingpan-Arkansas Project. The Special Master concludes that the Compact Administration was not vested with such authority.

* * *

DATE: September 15, 1989

/s/ Arthur L. Littleworth
Arthur L. Littleworth
Special Master

1951 Compact Administration Resolution

WHEREAS the Arkansas River Compact Administration, an official interstate body created by the Arkansas River Compact and charged with the administration of such compact, is interested in the proposed development to the extent that its construction and operation shall not interfere with the rights, interests and obligations of Colorado and Kansas under the Compact;

NOW BE IT RESOLVED by the Arkansas River Compact Administration that the following comments and recommendations relating to said report of the Secretary of Interior, to wit:

> The Arkansas River Compact Administration submits these comments and recommendations to the Governors of Colorado and Kansas respecting the proposed Initial Development, Gunnison-Arkansas Project, Roaring Fork Diversion, Colorado, namely:
>
> 1. The Administration understands that the project plan proposes:
>
> (a) The importation by appropriate project works of approximately 70,000 acre-feet of water a year from the Colorado River Basin to the Arkansas River Basin for supplemental irrigation and domestic water supplies in Colorado and for the production of hydroelectric energy.
>
> (b) In connection with such importation of water and its regulation in the Arkansas River Valley by project works, the re-regulation of native waters of the Arkansas River (the term 'native waters', as herein used, being those waters covered and defined by

Art. III-B of the Arkansas River Compact).

2. The interstate water relations of Colorado and Kansas with respect to the Arkansas River do not justify any objection to the proposed project development for the importation of Colorado River water (described in sub-paragraph (a) above).

3. The re-regulation of native waters of the Arkansas River (native waters being as above mentioned) concerns the Arkansas River Compact Administration and both Colorado and Kansas in complying with the provisions of the Arkansas River Compact and maintaining the benefits and obligations of the two states under that Compact. To that end, it is recommended to the Governors of Colorado and Kansas, and expressed as a policy of the Arkansas River Compact Administration, that the Initial Development, Gunnison-Arkansas Project, Roaring Fork Diversion, Colorado, as set forth in Project Planning Report No. 7-8a. 49-1 of the Bureau of Reclamation, be approved; provided, however, that there shall be no re-regulation of native waters of the Arkansas River as proposed in such report until a plan of operation, rules, regulations, procedures and agreements in furtherance thereof, including any pertinent agreements between the Corps of Engineers and the Bureau of Reclamation, shall have been submitted to, and approved by, the Arkansas River Compact Administration and the affected water users.

4. It is the purpose and intent of these recommendations that the proposed project development shall not interfere with or defeat the rights, interests and obligations of Colorado and Kansas under the Arkansas River Compact.

be transmitted to the Governors of the States of Colorado and Kansas and such Governors be and are hereby requested to submit the same to the Secretary of Interior with their official State comments and recommendations upon said proposed project and development.

On vote being taken, the motion carried and was declared adopted.